Supreme Court, U.S.
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No. 091110

In The Supreme Court of the United States

ALEX B. PARK,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether reliance on an inference in a search warrant application that a person has downloaded and retained images of child pornography to support a finding of probable cause violates the Fourth Amendment's requirement of particularized suspicion when the only evidence contained in the affidavit to support the inference is that the individual had purchased access to a website that contained both child pornography and legal pornography and no specific evidence established that he ever downloaded illegal images or had an interest in child pornography?

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The unpublished decision of the Wisconsin Court of Appeals affirming the trial court order denying Mr. Park's Motion to Suppress and Motion to Dismiss Due to *Franks* Violation is reported as *State v. Park*, 2009 WI App 141, 774 N.W.2d 476 (Ct. App. 2009) (App. 1).

The unpublished decision of the Wisconsin Court of Appeals remanding the case for a *Franks* hearing is reported as *State v. Park*, 2007 WI App 216, 739 N.W.2d 490 (Ct. App. 2007) (App. 32).

The order dated December 14, 2009 of the Supreme Court of Wisconsin denying Mr. Park's petition for review is unreported. (App. 73).

JURISDICTION

The Wisconsin Supreme Court denied Mr. Park's petition for review on December 14. 2009. This court has jurisdiction to decide the Fourth Amendment issues presented by this case pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution and Article 1 Sec. 11 of the Wisconsin Constitution both provide:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Wisconsin State Statutes § 948.12(1m), defines the crime of Possession of Child Pornography as follows:

> (1m) Whoever possesses[1] any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct under all of the following circumstances may be penalized under *sub. (3)*:
>
> (a) The person knows that he or she possesses the material.
>
> (b) The person knows the character and content of the sexually explicit conduct in the material.
>
> (c) The person knows or reasonably should know that the child engaged in sexually

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[1] In *State v. Lindgren*, 275 Wis. 2d 851, 687 N.W.2d 60 (Ct. App. 2004), the court ruled that the element of possession in a prosecution for a violation of § 948.12 is established by the defendant utilizing a computer to access the Internet and clicking on thumbnail images to create larger pictures for viewing, accessing some images twice, and saving at least one image to a personal folder on his computer.

explicit conduct has not attained the age of 18 years.

STATEMENT OF THE CASE

On June 16, 2005, Agent Eric Szatkowski of the Wisconsin Department of Justice reviewed information provided to him by the U.S. Immigration and Customs Enforcement Agency (hereinafter ICE) that indicated that a credit card issued to Alex B. Park was used on one occasion on May 14, 2003, to purchase some form of access into a website that contained an "extensive collection" of child pornography. Agent Szatkowski conducted a minimal investigation which verified the petitioner's current address and Internet provider and on June 17, 2005, completed an application for search warrant for Mr. Park's residence. (App. 75 93).

The affidavit prepared by Agent Szatkowski was almost completely comprised of boilerplate information: pages which detailed his qualifications, pages providing information regarding ICE's Operation Falcon – the source of the information regarding Mr. Park having paid for access to a targeted website, and pages of general information regarding the use of computers by persons interested in child pornography. Given the lack of particularized incriminating evidence regarding both the contents of the *darkfeelings.com* website and the petitioner's conduct and history in the application, Agent Szatkowski's

summary in the last section of his affidavit accurately describes the totality of the individualized evidence he had available regarding Mr. Park:

> Based on his training and experience, and the totality of this investigation, your affiant believes that evidence of child pornography is likely to be at Park's residence, [Home Address Omitted]. Your affiant believes park has demonstrated an interest in those materials by meticulously providing detailed personal information, including his name, address, e-mail address, and credit card number to a website trafficking in child pornography. Your affiant, therefore, also believes that Park's interest in child pornography has not diminished since his documented online activities with Regpay in 2003, and he is likely to have obtained many additional images of child pornography since he purchased a membership into www.darkfeelings.com.

(App. 92). On June 18, 2005, a magistrate approved the application for a warrant. On June 22, 2005, the warrant was executed at the petitioner's residence and Mr. Park was arrested and ultimately charged in a criminal complaint with six counts of possession of child pornography, violations of § 948.12, Wis. Stats. (R 3).

Mr. Park thereafter filed a Motion to Suppress Evidence challenging the admissibility of the evidence seized from his home computer as a result of the search warrant. (R 12). An additional Motion to

Suppress Based on a *Franks* Violation was filed alleging Agent Szatkowski had reason to believe information contained in Paragraph 19 of his affidavit was false. (R 17). On December 16, 2005, the Court issued a written decision and order denying both motions. (App. 60-72).

On April 4, 2006, the petitioner entered guilty pleas to three counts of possession of child pornography, violations of § 948.12, Wis. Stats. and was placed on probation. Mr. Park thereafter filed an appeal of the trial court's decisions on the motions. That appeal was decided on August 7, 2007. *See State v. Park*, 2007 WI App 216, 739 N.W.2d 490 (Ct. App. 2007) (App. 32) (hereinafter *Park I*). The court in *Park I* found that Mr. Park had met his burden to establish the affidavit supporting the application for the search warrant may have contained statements that were knowingly false or made with reckless disregard for the truth, and that without such statements the content of the warrant affidavit was insufficient to establish probable cause. *See Franks v. Delaware*, 438 U.S. 154 (1978). As to the affidavit failing to establish probable cause, the court stated:

> What is not in the affidavit, however, is more telling . . . Szatkowski *does not* describe what investigation was conducted to determine what type of membership Park purchased in May 2003, *does not* state that Park in fact downloaded anything, legal or otherwise, from the darkfeeling.com website, *does not* state whether the advertising of the website

> as containing child pornography was available before purchasing a membership to the website (thereby allowing the inference that Park knew the website contained illegal content), and *does not* provide any information, other than the stricken statements regarding the Nelson case, that Park either still owned the same computer from which he could have accessed the darkfeeling.com website twenty-five months earlier, or that regardless of the computer that he currently possessed, illegal child pornography would still be on Park's current computer . . . Szatkowski presents nothing from the ICE or his own investigation that an informant provided information that Park had illegal images on his computer at any time or that Park had ever been accused of any inappropriate sexual conduct with children. While Szatkowski details the profile of a collector of child pornography, he sets forth in his affidavit no facts as to how Park fits this profile, beyond the stricken example.

(App. 50-51). The court then concluded:

> Without evidence showing that Park actually accessed, downloaded, or otherwise possessed illegal images from the darkfeeling.com website, or any specific facts showing how Park matched the profile of a collector of child pornography, an issuing court may not reach the inference that twenty-five months after Park purchased a membership to the darkfeeling.com website, his current computer would contain illegal

> images, and therefore may not find that there is sufficient probable cause for the issuance of a warrant. (emphasis in original)

(App. 52). The Wisconsin Court of Appeals in *Park I* also suggested the investigation completed by Agent Szatkowski was minimal and would not support application of the good faith exception to save the warrant according to Wisconsin law. *See State v. Eason*, 245 Wis. 2d 206, 217 (2001). The Court remanded the case for a *Franks* hearing. (App. 56).

On November 9, 2007, and November 29, 2007, a *Franks* hearing was conducted. On June 16, 2008, the court issued a written decision again denying the petitioner's motions. (App. 30). The petitioner filed an appeal of that decision on September 26, 2008. On August 4, 2009, the Wisconsin Court of Appeals issued a decision affirming the trial court's decisions denying the Motion to Suppress Evidence and Motion to Dismiss Due to *Franks* Violation (App. 1) (hereinafter *Park II*).

As to the Motion to Suppress, the Court of Appeals in *Park II* ruled that the affidavit established probable cause for the search warrant based on the inference that Mr. Park downloaded illegal content which was solely drawn from the evidence that he paid for access to a site that contained child pornography:

> . . . Szatkowski's affidavit states that Internet subscribers to child pornography websites view, download, transfer to disks or other computers and retain the images of child pornography they obtain from the

> websites to which they subscribe. The affidavit establishes that Park subscribed to a website in May 2003, and that federal agents saw that it had child pornography on it in July and August 2003. . . . The inferences that Park saw, downloaded and retained the illegal images are reasonable and create a fair probability that the illegal images would still be found on his computer in 2005.

(App. 28) The court in *Park II* cited to four federal court decisions to support application of this inference to the minimal particularized information included in Agent Szatkowski's affidavit. The panel in *Park II* stated:

> "The Second and Fifth Circuits, for example, have noted that evidence that a person visited or subscribed to websites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material." *Wagers*, 452 F.3d at 540 (citing *Martin*, 426 F.3d at 77; and *United States v. Froman*, 355 F.3d 882, 890-91 (5th Cir. 2004)).
>
> In *Martin*, the Second Circuit Court of Appeals found that: "It is common sense that an individual who joins such a site would more than likely download and possess such material." *Id.*, 426 F.3d at 75. In another case, the general description of the characteristics of child pornographers as hoarders of their images was found sufficient to support probable cause for a search warrant in the face of a staleness complaint. *See*

> *United States v. Gourde*, 440 F.3d 1065, 1068 (9th Cir. 2006).

(App. 27-28).

The court declined to address whether the good faith exception to the exclusionary rule applied:

> Based on this disposition, we need not address whether the good faith exception to the exclusionary rule, *see United States v. Leon*, 468 U.S. 897, 918-20 (1984), applies. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need to be addressed).

(App. 2, n.2).

The petitioner filed a petition for review of that portion of this decision relating to the Motion to Suppress with the Wisconsin Supreme Court. That petition was denied by order dated December 14, 2009. (App. 73-74).

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

The factual background leading to the warrant application in this case is a common scenario found in a substantial number of cases dealing with Internet child pornography. A website containing images of child pornography came to the attention of law enforcement and records relating to individuals known to have accessed the site revealed the petitioner had

purchased "a membership" to the site. Two years later agents applied for a search warrant which was executed at the petitioner's home. The probable cause and staleness issues presented by these facts have been at the core of a plethora of divided and conflicting federal court decisions over the last decade. This court has allowed these issues to percolate.

II. REVIEW BY THIS COURT IS NECESSARY TO PRESERVE FUNDAMENTAL FOURTH AMENDMENT PROTECTIONS

A troubling legal principle emerging from the brew of Internet child pornography cases is at the core of the outcome in this case. The *Martin, Froman, Wagers* and *Gourde* decisions were cited in *Park II* as authority for the court to make a finding that Park downloaded and retained illegal images based solely on evidence establishing that he purchased access to a site which contained some amount of child pornography. These cases are being cited as authority to apply this inference in virtually every published decision involving search warrants related to Internet child pornography, even when as here the type of access purchased is not specified, the site contains legal pornography and there is no evidence the individual viewed or downloaded any illegal images or had an interest in child pornography. The court in *Park II* relied on this inference to dismiss the common sense conclusions of its fellow justices in *Park I* and uphold the warrant in this case when the affidavit is comprised of little more than boiler plate

conclusions about child pornography collectors and contains only a minuscule amount of individualized information as to the website and as to Mr. Park and his conduct.

As this court recognized just last year in the context of automobile searches incident to an arrest, misapplication of the Fourth Amendment creates a serious and recurring threat to the privacy of individuals. *Arizona v. Gant,* 556 U.S. ___, 129 S.Ct. 1710, 1721 (2009). One of the most sacred and enduring principals of the Fourth Amendment is respect for the privacy and sanctity of a person's home. *Wilson v. Layne*, 526 U.S. 603, 692 (1999). The time has come for this court to do what it did in *Gant* – intervene to reapply traditional Fourth Amendment principles to protect citizens from unreasonable searches and seizures – this time involving not their automobiles, but their homes. This court needs to step in and assure that future defendants are not subjected to illegal searches based on an unreasonable inference drawn from minimal evidence of association alone and reaffirm the Fourth Amendment's requirement that probable cause be established by particularized suspicion.

A. THE UNIQUE ASPECTS OF THIS CASE MAKE IT APPROPRIATE FOR REVIEW

This case presents a number of unique aspects which make review by this court timely and appropriate. First, there are fewer particularized facts

alleged in the warrant affidavit in this case than counsel could find in any of the more than one hundred published state or federal court decisions involving search warrants for child pornography. The facts here frame the issue purely and test the limits of what is required in this genre of cases to satisfy probable cause. Secondly, the federal cases relied upon by the court in *Park II* are the same decisions that have been criticized for being wrongly decided by other federal courts. The decision in *Park II* is an example of the danger posed by application of the inference those cases have been cited for in cases where particularized suspicion is lacking. Lastly, there were two different panels of the Wisconsin Court of Appeals evaluating the probable cause issues in this case, one decided *Park I* and two years later another *Park II*. While their decisions involve the same warrant application, their holdings are inconsistent and in conflict. The court in *Park I* noted the absence of particularized suspicion and found probable cause lacking. The court in *Park II* glossed over the absence of particularized suspicion and applied the inference at issue here to the minimal evidence that existed to uphold the warrant. The validity of a search warrant should not hinge on the selective application of questionable precedent but on established principles guiding Fourth Amendment analysis. This court needs to reestablish those principles in the unique context of Internet access to illegal material.

B. THE BACKGROUND: THE LAW ON PROBABLE CAUSE

When scrutinizing an application for a search warrant, the issuing magistrate must make a practical, common sense decision whether, given all the circumstances set forth in the affidavit, there is probable cause to believe that contraband or evidence will be found in the place to be searched. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The Fourth Amendment restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion. *Chandler v. Miller*, 520 U.S. 305, 308 (1997). The totality of the circumstances or the "assessment of the whole picture" must raise the suspicion that an individual is engaged in wrongdoing. *United States v. Cortez*, 449 U.S. 411 (1981).

An affidavit that contains nothing but the legal conclusions of the affiant is insufficient to establish probable cause for a search warrant. *State v. Higginbotham*, 162 Wis. 2d 978, 992, 471 N.W.2d 24 (1991). The affidavit must provide sufficient facts to permit the magistrate to draw the inferences necessary to make a finding of probable cause, and the magistrate must make an independent evaluation of the evidence and not merely rely without question on the assertions in the affidavit. *Giordenello v. United States*, 357 U.S. 480, 485-86 (1958); *Illinois v. Gates*, 462 U.S. at 239. A magistrate should not just "rubber stamp" the conclusions drawn by the police. *United States v. Travisano*, 724 F.2d 341, 345-46 (2d Cir. 1983).

The requirement that police have objective particularized evidence to support a search has been at the heart of Fourth Amendment protections for over 40 years. *See Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968). Being observed in the wrong place at the wrong time has never been enough without additional particularized suspicion to establish probable cause. *See Brown v. Texas*, 443 U.S. 47, 52 (1979). Association with an organization that has some members who engage in illegal activities does not, by itself, create the particularized suspicion required to establish probable cause for a search warrant. *United States v. Brown*, 951 F.2d 999, 1002 (9th Cir. 1991); *see also United States v. Rubio*, 727 F.2d 785 (9th Cir. 1984).

The inference made available by the *Martin* line of federal cases and adopted by the court in *Park II* that a person can be assumed to have downloaded, hoarded and continued to accumulate images of child pornography based on two year old vague and minimal particularized evidence that he paid for access to a site that contained some amount of child pornography violates the Fourth Amendment's core requirement of individualized suspicion. Application of such an inference in a case where there is no particularized evidence that establishes the individual whose home is being searched has an interest in child pornography is especially troubling and will continue in the future without intervention by this court.

Furthermore, stale information cannot be used in a probable cause determination. *United States v. Spikes*, 258 F.3d 913, 923 (6th Cir. 1998). It is axiomatic that probable cause must exist at the time of the search and not merely at sometime earlier. *United States v. Kennedy,* 427 F.3d 1136, 1141 (8th Cir. 2005). There is no bright line test for determining when information is stale, rather courts are to look at the circumstances of the case. *United States v. Morales-Aldahondo*, 524 F.3d 115, 119 (1st Cir. 2008). Courts have recognized that the staleness argument takes on a different analysis in the context of child pornography cases due to the recognized proclivity of child pornography collectors to hoard images and rarely, if ever, dispose of their collections. *United States v. Prideaux-Wentz*, 543 F.3d 954, 958 (7th Cir. 2008).

Courts in child pornography cases have found probable cause with delays in the execution of warrants of several months to over a year. *See e.g., United States v. Shields,* 458 F.3d 269, 272 (3d Cir. 2006) (eight months); *United States v. Lacy,* 119 F.3d at 746 (9th Cir. 1997) (ten months). However, where the delay exceeds two years as is the case here, courts that have found probable cause in the face of staleness challenges have generally required additional information regarding conduct that demonstrates an ongoing interest in child pornography, such as a prior conviction or other suspicious behavior involving children. *See e.g., United States v. Irving,* 452 F.3d 110, 125 (2d Cir. 2006) (two year old information was

not stale when coupled with evidence of prior conviction related to child exploitation); *United States v. Riccardi*, 405 F.3d 852, 860-61 (10th Cir. 2005) (five year old information not stale when coupled with ongoing sexual harassment of young men). This court has stated that the resolution of such questions must be determined by the circumstances of each case. *Soro v. United States*, 287 U.S. 206, 210-11 (1932).

The circumstances of this case establish that the magistrate reviewing the stale particularized evidence from 2003 should never have found it likely that child pornography would be found in petitioner's home in 2005. The total absence of any particularized evidence in the application that the petitioner had any history or had engaged in any conduct suggesting he was interested in child pornography, either prior to the date of the application or after, required a finding that the two year old information in the affidavit was stale. Application of the inference that the petitioner would continue to possess illegal images for the two years before the warrant was issued based on the evidence presented without particularized facts violated the Fourth Amendment.

III. THE FEDERAL COURT DECISIONS CITED AS AUTHORITY IN *PARK II* VITIATE THE FOURTH AMENDMENT'S REQUIREMENT OF INDIVIDUALIZED SUSPICION TO ESTABLISH PROBABLE CAUSE

An analysis of the federal court decisions cited by the court in *Park II* – *Martin, Froman, Gourde* and

Wagers – establishes that they are not valid precedent for universal application of the inference that "evidence that a person visited or subscribed to websites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material". (App. 27). The two most often cited of those federal decisions, *Martin* and *Gourde,* were the product of divided courts and have been criticized by dissenting justices and other appellate opinions since they were issued. To use these decisions to support a finding of probable cause in a case with minimal particularized evidence is simply wrong. The frequency with which the *Martin* and *Gourde* cases are being cited in support of universal application of the inference that membership in a site containing some child pornography supports a finding that the individual downloaded and retained illegal images amplifies the need for this court's review.

A. THE EARLY DECISIONS

In one of the earliest decisions dealing with the issue of probable cause for a search warrant based on known access to an Internet group involving child pornography, the district court in *United States v. Perez*, 247 F.Supp.2d 459 (2003), scrutinized a search warrant affidavit identical in almost all respects to that evaluated a year later in *Martin* and *Froman*. All three of these cases arose out of Operation

Candyman,[2] a federal investigation of a number of e-groups which were determined to have as their sole purpose the sharing of child pornography.

The district court in *Perez* found that establishing membership to a group that contains some illegal child pornography does not establish probable cause to believe that a person downloaded illegal images. The court in *Perez* summarized the content of the affidavit as follows:

> . . . general information about child pornography and the use of the internet and computers to distribute it; information regarding the Candyman Egroup generally, including that the undercover agent was able to download images of child pornography from the Candyman site; information that the undercover agent received numerous e-mails, including many with images of child pornography attached; information that Candyman members had e-mail delivery options, including the option not to receive any e-mails at all; and representations that a user joined the Candyman Egroup using an e-mail address that was registered to Perez.

(*Id.* at 481). The court then identified what was not in the affidavit, a list remarkably similar to that noted

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[2] While these Operation Candyman cases all involved a *Franks* issue related to what was determined to be untruthful assertions in the affidavit prepared by the agent who ran the operation, the cases cited here all dealt with the sufficiency of the affidavits after the Frank's information was excised.

by the court in *Park I* (App. 50-51). The court in *Perez* noted:

> The "corrected" affidavit contains no representation that the user-Perez-received any e-mails or that he received or downloaded or viewed any images or files or that he sent or uploaded any images or files. In fact, the "corrected" affidavit reports that Candyman members could choose not to receive any e-mails, but it provides no information as to which option Perez had selected. The "corrected" affidavit contains no representation as to how long Perez was a member, whether he unsubscribed, or whether he did anything beyond subscribing. The "corrected" affidavit contains no information about what it meant to be a "member" or "subscriber."

Based on this information, the court held:

> In the end, all that is left is the fact that Perez subscribed to a website where unlawful images of child pornography could be downloaded. I conclude this was not a sufficient "residue" to permit a magistrate judge to determine that a fair probability existed that contraband or evidence of child pornography would be found in Perez's home.

Id. The district court specifically refused to allow an inference that Perez would have had an interest in child pornography and downloaded illegal images simply from information that he had access to a site that others used for illegal purposes.

In another early Operation Candyman case dealing with the identical issue and the same e-group, the district court in *United States v. Strauser*, 247 F.Supp.2d 1135 (E.D. Missouri 2003), also found the affidavit insufficient to establish probable cause. Beyond what was alleged in *Perez*, Strauser was additionally alleged to have subscribed to the e-group and had not unsubscribed as of the date the site was shut down. The affidavit in *Strauser*, as was the case in *Park*, did not allege that an individual would have had to be aware of the illegal content of the site because of advertising or warnings displayed before joining. The court in *Strauser* found that without that forewarning, an innocent person could subscribe without any interest in viewing or obtaining illegal images. The court stated:

> Essentially, the government asks me to find that if a person one time subscribes to a service, whose content could not be known for sure until after subscribing, and the person never goes to the trouble of unsubscribing, than that person is likely to possess child pornography . . . a person could have clicked on the subscribe button, still not knowing what was on the site . . . then have seen the child pornography on the site, been shocked, and immediately left the site, never to return, not even to search for and find the method of unsubscribing. In such a case there would not be any emails containing child pornography sent, and the person would not receive or be in possession of any child pornography. Yet under the government's

> theory, probable cause would exist to obtain a warrant to search this persons home. I believe that the Fourth Amendments requirement that no Warrants shall issue, but upon probable cause requires more.

Id. at 1144-45. Once again, the court refused to draw an inference that the defendant downloaded illegal images and retained them without particularized evidence that established Strauser was interested in the illegal content available on the site.

In contrast to the *Perez* and *Strauser* decisions, the district court in *United States v. Laufer*, 245 F.Supp.2d 503 (W.D. New York 2003), did find probable cause for a search warrant for Internet child pornography where the affidavit alleged some particularized facts regarding the site and how it was set up and operated. The affidavit established that Laufer had paid for a membership for three months to a site called "netnews 3" that contained child pornography and that to join the website Laufer would have had to direct the computer several times to proceed in the face of warnings that hardcore images of child pornography would be received. The affidavit indicated the site had a notice to potential members on its welcome page that:

> . . . the website contained hard core child sex including, for the most part movies which have been banned and which could be accessed only by subscribers to the website's Platinum Plan. . . . The notice also warned potential website subscribers who were

> offended by hard core child sex not to choose the Platinum Plan. . . . Agent Hunt also observed that the website contained information on how website subscribers could avoid detection by law enforcement.

Id. at 507-08. The affidavit in *Laufer* even included the fact that the defendant had purchased a Platinum Plan membership, granting him access to what had been advertised as the hard core child sex available on the site. Given the specificity of the information in the affidavit, the court in *Laufer* concluded that Laufer had joined the site with an interest in child pornography and with the intent to download the illegal images contained in the site:

> Defendant's actions in making three consecutive monthly payments for the Platinum Plan subscription for access to the website are consistent with the conclusion that it is probable that Defendant thereafter accessed the Internet website and proceeded to download images which meet the legal definition of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) . . . Further, because Defendant subscribed to the website for three months, he would have been entitled to receive the quarterly CD containing child pornography as advertised in the notice that was first displayed when Agent Hunt first accessed the website.

Id. at 510. The affidavit in *Laufer* contained no information regarding Laufer having downloaded illegal images, yet the inferences applied by the court

to find probable cause were at least arguably supported by detailed factual information regarding the site and Laufer's conduct included in the warrant application.

B. THE FIFTH CIRCUIT DECISION IN *FROMAN*

One year after the decisions in *Laufer* and *Strauser*, the Fifth Circuit decided one of the cases cited by the court in *Park II*, *United States v. Froman*, 355 F.3d 882, 890 (5th Cir. 2004). The court in *Froman* upheld a search warrant in another Operation Candyman case involving the same e-group as *Perez* and *Strauser*. The affidavit established that *Froman* was a member of the Candyman e-group for close to a month until the site was shut down. The affidavit included information that the welcome message to the group stated as follows:

> This group is for People who love kids. You can post any type of messages you like too [sic] or any type of pics and vids you like too [sic]. P.S. IF WE ALL WORK TOGETHER WE WILL HAVE THE BEST GROUP ON THE NET.

Id. at 885. The affidavit also included the information that to join the e-group a person had to visit the site and send an e-mail to the group moderator requesting permission to join. The website enabled members to upload and download images of child pornography, and members even provided input as to the types of

images they preferred. The investigating agent described the hundreds of images of child pornography he captured or received in e-mails through his membership in the group. Members were also directed to web pages with similar illegal content. Furthermore, the affidavit stated that agents discovered that Froman registered a number of screen names with AOL that reflected his interest in child pornography, including "Littlebuttsue" and "Littletitgirly".

The Court in *Froman* held that the magistrate could reasonably infer that "the overriding reason someone would join this group was to permit him to receive and trade child pornography" based on the specific information in the affidavit regarding the site and the defendant's conduct. *Id.* at 890. The court stated:

> We agree with the district court that it is common sense that a person who voluntarily joins a group such as Candyman, remains a member of the group for approximately a month without cancelling his subscription, and uses screen names that reflect his interest in child pornography, would download such pornography from the website and have it in his possession.

Id. at 890-91.

The *Froman* decision was cited by the court in *Park II* to suggest an inference could be drawn from mere membership in groups like the Candyman e-groups, but it is obvious the court in *Froman*

intended that the inference be applied only when coupled with the kind of particularized evidence available regarding *Froman*. It is this slippery slope that soon drew the criticism of other federal courts.

Shortly after the Fifth Circuit decision in *Froman*, the district court in *United States v. Kunen*, 323 F.Supp.2d 390 (E.D. N.Y. 2004), took issue in another Candyman case with the holding in *Froman* that membership in a group like the Candyman e-group, whose purpose is to trade child pornography, establishes probable cause to believe the individual possessed illegal images. The affidavit in *Kunen* contained the same facts regarding the Candyman e-group as that in *Froman*. The affidavit stated that agents visited the site and determined that the e-group's purpose was to facilitate the dissemination and sharing of child pornography. In stating its disagreement with the decision in *Froman*, the court stated:

> Even if, arguendo, a majority of Candyman members are more likely than not to have child pornography on their computers at any given time, that does not, standing alone, cause the entire membership to be fair game for search warrants. Which is to say, the primary focus for probable cause purposes subject to an arguable exception not relevant here, must be on the individual, as an individual, rather than as a member of a group.

Id. at 400-01. The court agreed with the decisions in *Perez* and *Strauser* and found application of that

inference violates the requirement of individualized suspicion to establish probable cause.

C. THE NINTH CIRCUIT DECISION IN *GOURDE I*

The Ninth Circuit Court of Appeals entered the fray in *United States v. Gourde*, 382 F.3d 1003 (9th Cir. 2004), *rehearing en banc*, 440 F.3d 1065 (9th Cir. 2006). The original three-judge panel in *Gourde I* granted the defendant's motion challenging probable cause for the warrant in a decision coming after *Froman*, but almost one year prior to the Second Circuit's decision in *Martin*. The affidavit in *Gourde* included many more facts regarding the website at issue and the conduct of the defendant than mere membership in a site which contained child pornography. The affidavit stated that the website's name, "Lolitagurls.com", suggested to prospective visitors that its content was illegal. The welcome page of the site contained images of nude and partially-dressed girls, some prepubescent, along with this text:

> lolitagurls.com offers hard to find pics! With weekly updates and high quality pix inside, you cant go wrong if you like young girls! Lolitas.Full size High Quality Pictures inside Join Now – instant access here THIS SITE updated weekly WITH NEW LOLITA PICS This site is in full compliance with United States Code Title 18 Part I Chapter 110 Section 2256.

Id. at 1005. The affidavit established that agents visiting the site observed that the welcome page directed the user to a second page with more images of nude girls, some prepubescent, including three images displaying the genital areas of minors, and a caption reading "Lolitas age 12-17". The second page contained this text:

> Welcome to Lolitagurls. Over one thousand pictures of girls age 12-17! Naked lolita girls with weekly updates! What you will find here at Lolitagurls.com is a complete collection of young girl pics. BONUS: You can get movies/mpegs at our partners site after you join if you wish.

Id. The affidavit stated the site also had testimonials from members, such as "This lolita site has everything with young girls!" and "I've never seen in my life the pics of so cute pre-teen girls." This page offered the viewer three ways to see other pages on the website: (1) take a free tour of the site, (2) become a new member of the site, or (3) log in as a returning member. Gourde became a member and remained a member without cancelling his membership for two months until the site was shut down.

The panel in *Gourde I* found this affidavit did not establish probable cause and distinguished the recent decision in *Froman*:

> The government urges us to follow the Fifth Circuit's recent decision in *United States v. Froman,* 355 F.3d 882 (5th Cir. 2004); however, our decision here is not in

> conflict with the Fifth Circuit's precedent. In *Froman,* the court upheld a search warrant where the government provided evidence that Froman was a member of a group whose "singular goal . . . was to collect and distribute child pornography and sexually explicit images of children."
>
> . . . members of the group could choose to automatically receive emails with attached images, and the affidavit contained personalized evidence regarding Froman's interest in child pornography by way of his chosen screen names, "Littlebuttsue" and "Littletitgirly," . . . None of these facts bearing on Froman's actual possession of child pornography is present here.

Id. at 1011. The original Ninth Circuit panel in *Gourde I* refused to apply the inference utilized by the court in *Froman* and concluded mere membership in the site, even with detailed information in the affidavit regarding the name, contents, what would be viewed, etc. was not enough to establish probable cause:

> . . . there was no evidence here that Gourde actually downloaded any child pornography from the Lolitagurls.com website; rather, much like the catalog order described in *Weber,* the affidavit here revealed only that Gourde had subscribed, and thereby received access, to a mixed-pornography website, which is insufficient to create a fair probability that evidence of possession of child

> pornography would be found on Gourde's computer or related equipment.

Id. at 1012-13.

D. THE SECOND CIRCUIT DECISION IN *MARTIN*

Shortly after the decisions in *Kunen*, *Gourde I* and *Froman*, the Second Circuit Court of Appeals decided *United States v. Martin*, 426 F.3d 68 (2d Cir. 2005), another Operation Candyman case. The defendant in *Martin* was established to have subscribed to a different Candyman e-group than the previous cases, one entitled "girls 12-16". The affidavit in *Martin* detailed the e-group's welcome message which advised those contemplating joining the group that the group's purpose was to facilitate the trading of child pornography. The warrant affidavit in *Martin* included the entire content of the welcome message, which in relevant parts advised those contemplating membership:

> Hi all, This group is for all those ho [sic] appreciate the young female in here [sic] finest form. Watching her develop and grow is like poetry in motion [sic], to an age where she takes an interest in the joys and pleasures of sex. There is probably nothing more stimulating than watching a young teen girl discover the pleasures of the orgasm. The joy of feeling like she is actually coming into womanhood . . . This is the place to be if you love 11 to 16 yr. olds . . . The

> choice is all yours. Welcome home! Post videos and photographs . . . Membership is open to anyone, but you will need to post something. . . . and a pic or vid would be a good to [sic] . . .

Id. at 71. The court concluded the "girls 12-16"'s welcome message unabashedly announced that its essential purpose was to trade child pornography. The court also found that the name of the e-group, "girls 12-16," further made apparent that the site's focus was on minor girls. The court also concluded that the illicit purpose of the website could be inferred from the website's technological features that facilitated the trading of child pornography as detailed in the affidavit. The court decision also noted that Martin continued to subscribe to the site and never unsubscribed until the site was shut down by authorities.

The court in *Martin* concluded that it would be "common sense that an individual who joins such a site would more than likely download and possess such material" and found the content of the affidavit established probable cause to support the search warrant. Obviously having taken note of the cases reaching contrary results before them, the majority in *Martin* acknowledged the implications of its decision as it effects the right of free association and highlighted the fact that probable cause should not be established simply by becoming a member of an offensive group, but rather on the "totality of the evidence" offered in the affidavit. The court stated:

> We believe that our conclusion adequately balances the need for law enforcement to have a certain amount of latitude in conducting criminal investigations with the constitutional guarantees of free association and protection against unlawful searches. It does not grant the government an unchecked license to search citizens' homes simply because they are members of an offensive or disreputable group. Rather, it recognizes that, depending on the totality of the evidence proffered in the affidavit, a substantial likelihood of criminal activity may exist if an individual is a member of an internet e-group whose purpose is unlawful. . . . *See Gates*, 462 U.S. at 238, 103 S.Ct. 2317.

Id. at 76. The decision in *Martin* was a divided one, with one justice observing in her written dissent:

> First, the corrected affidavit does not allege facts that support an inference that Martin participated in *any* of the E-group's legal or illegal functions. Second, the corrected affidavit does not support the conclusion that the overriding purpose of the E-group was illegal. *See* Op. at 74-75. Third, the corrected affidavit's allegation that Martin was an E-group subscriber indicates only Martin's propinquity to others who were committing a crime, which is not sufficient to establish probable cause. Fourth, the corrected affidavit's allegations regarding the propensities of "collectors of child pornography" do little to establish probable cause with respect to Martin.

Id. at 79. Judge Pooler had specific concerns regarding the application of the inference applied by the majority and cited to by the court in *Park II*, concluding that "the majority's focus on group probabilities runs counter to the well-settled notion that probable cause must be based on particularized facts." *Id.* at 81, *see Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

The proposition advanced in *Martin* that membership in a group or website that contains child pornography establishes probable cause that the person has downloaded and hoarded the images, the one relied on by the panel in *Park II* and numerous other courts, was immediately criticized by other judges of the Second Circuit. In another Operation Candyman case, *United States v. Coreas*, 419 F.3d 151 (2d Cir. 2005), a different panel of the Second Circuit expressed its belief that *Martin* "was wrongly decided." *Id.* at 159. The court adopted the dissenting view that *Martin* focused on the overriding illegal purpose of the group rather than on the activities of the person targeted for the search. The court stated:

> In the view of this panel, that does not remotely satisfy Fourth Amendment standards. We had thought it was well settled that a "person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Ybarra v.*

> *Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). . . .

Id. at 156.

> That Candyman was a forum for a repugnant viewpoint does not alone support an inference of criminal conduct. Coreas broke no laws in joining the group and visiting its website, provided that he did not download any child pornography while there (and there was no allegation that he did). . . . Where an organization is not so "wholly illegitimate" that membership itself necessarily implies criminal conduct, membership alone cannot provide probable cause. *See United States v. Brown*, 951 F.2d 999, 1003 (9th Cir. 1991).
>
> Nonetheless, in a case argued a few weeks before this one and decided earlier this month, a divided panel of this Court appeared to reach different conclusions from those set forth above. *See United States v. Martin*. . . . *Martin* found the requirements of probable cause met by a similar affidavit pertaining to a defendant's membership in a related e-group, girls12-16 . . . because a defendant's mere membership in an e-group whose "primary reason for existence" is to trade child pornography is enough.

Id. at 157. The panel in *Coreas* adhered to *Martin*'s holding because the cases were indistinguishable and *Martin* was binding precedent:

> . . . . since the Martin case was heard first, we are compelled, under established rules of this circuit, to affirm Coreas' conviction.

Id. at 156-59.

Individual requests for *en banc* rehearing in *Martin* and *Coreas* were denied by their respective panels, as was a later consolidated request for rehearing. *See United States v. Martin*, 430 F.3d 73 (2d Cir. 2005). Judge Pooler encouraged the defendants to seek review by this court and wrote these strong words of concern in her dissent from the denial for rehearing:

> . . . the decision in *Martin* sets a perilous and plainly wrong precedent. Even if it were possible, we cannot wait for *Martin* to be limited on a case-by-case basis because the potential infringement on the rights guaranteed by the First and Fourth Amendments during the interim period is simply too great. *See Coreas*, 426 F.3d at 616 (rejecting the suggestion that *Coreas* can be distinguished from *Martin*). I urge the defense attorneys in these cases to seek certiorari, and, in the meantime, I caution the residents of New York, Connecticut, and Vermont to be careful which websites they visit because a few clicks of a mouse could subject their homes to search.

Id. at 77. Both Coreas and Martin did seek review by this court and their petitions for writs of certiorari

were denied. *See Martin v. United States*, 547 U.S. 1192 (2006), and *Coreas v. United States*, 547 U.S. 1192 (2006).

There was no turning back after *Froman* and *Martin*, as these decisions have been cited as precedent for application of the troubling inferences they promote by most courts dealing with the issue ever since. Once minimal evidence of access to a website containing some illegal material is established, these decisions provide precedent for upholding warrants under any circumstances and thereby serve to "dilute the First Amendment's protection against guilt by association" and diminish the Fourth Amendment's focus on "particularity and on protection of the privacy of the individual to be searched." *Id.* at 158.

E. THE NINTH CIRCUIT DECISION IN *GOURDE II*

The Ninth Circuit voted to rehear *en banc* its decision in *Gourde I* and the decision was issued close to one year after *Martin* was decided. *United States v. Gourde*, 440 F.3d 1065 (9th Cir. 2006) (hereinafter *Gourde II*). The full court, with two dissenting justices, reversed the original decision in *Gourde I*. The court here applied the inference that the original panel purposefully rejected. In *Gourde I* the panel specifically held that evidence of Gourde's subscription to the "*lolitagirls.com*" website was "insufficient to create a fair probability that evidence of possession

of child pornography would be found on Gourde's computer". *Gourde I*, 403 F.3d at 1012-13. The court in *Gourde II* held:

> Here, the reasonable inference that Gourde had received or downloaded images easily meets the "fair probability" test. It neither strains logic nor defies common sense to conclude, based on the totality of these circumstances, that someone who paid for access for two months to a website that actually purveyed child pornography probably had viewed or downloaded such images onto his computer. *See Gates*, 462 U.S. at 246, 103 S.Ct. 2317.

Id. at 1071. The court cited to the decision in *Martin*, noting its similar facts, and characterized its holding as precedent for a finding that "it is common sense that an individual who joins such a site would more than likely download and possess such material." *Id.*

F. THE SIXTH CIRCUIT DECISION IN *WAGERS*

In the latest of the federal cases cited by the court in *Park II*, *United States v. Wagers*, 452 F.3d 534 (6th Cir. 2006), the affidavit detailed that Wagers had purchased memberships to three different sites containing child pornography, one of which was the website at issue here, *darkfeelings.com*. The affidavit detailed the amount he paid for the memberships and established that each of the subscriptions was for between one and two months. The affidavit also

included information that Wagers had a conviction for possession of child pornography six years earlier. In finding the affidavit established probable cause, the Sixth Circuit followed the pattern of cases decided before it and cited to the decisions in *Martin* and *Froman* as authority for finding that from evidence that a person has had access to a site that contains child pornography it can be inferred that he is likely to have downloaded and hoarded illegal images. The court stated:

> Our opinion today is consistent with the views of our sister circuits. The Second and Fifth Circuits, for example, have noted that evidence that a person has visited or subscribed to websites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material. *United States v. Martin*, 426 F.3d 68, 77 (2d Cir. 2005); *United States v. Froman*, 355 F.3d 882, 890-91 (5th Cir. 2004).

G. THE WISCONSIN COURT OF APPEALS DECISION IN *GRALINSKI*

At the same time a panel of the Court of Appeals was deciding *Park I*, another panel of the Wisconsin Court of Appeals issued another decision in *State v. Gralinski*, 306 Wis. 2d 101, 743 N.W.2d 448 (Ct. App. 2007). The *Gralinski* case dealt with another Agent Szatkowski Operation Falcon investigation and a virtually identical warrant application as that in

Park. One significant difference in the two warrant applications was that in Gralinski's affidavit Agent Szatkowski included the fact that Gralinski had paid for memberships to two sites. *See id.* at 108. In a published decision, the court in *Gralinski* found that the application for the search warrant established probable cause. The decision relies heavily on an analysis of *Gourde II* and *Wagers*, citing the latter for the general proposition "that evidence that a person has visited or subscribed to websites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material". *United States v. Wagers*, 452 F.3d at 540. By the time *Park II* was decided, *Gralinski* was binding precedent cited by the court as authority in support of its decision regarding probable cause. (App 26-27).

III. THE RESULT IN *PARK II* WAS DETERMINED BY APPLICATION OF THE INFERENCES ESTABLISHED BY FEDERAL PRECEDENT WHICH VIOLATE THE FOURTH AMENDMENT WHEN APPLIED HERE

Agent Szatkowski's affidavit provides no specific evidence that Mr. Park downloaded, transmitted or received any images of child pornography from the website in 2003, nor that Mr. Park ever possessed illegal child pornography at any time before or after 2003. The only information included in the warrant affidavit specific to Mr. Park's conduct was that he

had used his credit card on one occasion to purchase some unknown right of access to a website that had an "extensive collection" of child pornography. While the affidavit indicated the amount the ICE agents themselves had paid for a membership to the *darkfeelings* site, there was no evidence as to what amount was paid by Mr. Park, what the process of joining entailed, nor what the membership entitled the petitioner to view. The affidavit did not advise the magistrate that the website was dedicated to illegal content or that it only contained illegal child pornography. The application for the warrant contained no evidence that there were any warnings or advertisements displayed at the entrance to the site on its welcome page which advised Mr. Park before he entered or joined the site that it contained illegal child pornography. There was no allegation in the affidavit that the name of the site would have given notice to Mr. Park that it contained child pornography. There is no information in the affidavit that Mr. Park had any sort of history that would suggest he had an interest in child pornography.

Agent Szatkowski's affidavit in *Park* contained fewer particularized facts than in any published decision to date dealing with the issue of probable cause and search warrants for Internet child pornography. The finding of probable cause by the court in *Park II* is a vivid example of the danger inherent in the slippery slope created by higher courts creating apparent precedent for undiscerning lower courts to use to fill factual voids by applying inferences which

implicate the Fourth Amendment's requirement of particularized suspicion.

The use of the boilerplate affidavit in this case which contained no particularized evidence regarding the petitioner required the court in *Park II* to rely on use of the *Martin* line of cases for the proposition that purchasing access to a site containing some illegal content establishes probable cause that the individual downloaded and kept illegal images. An analysis of *Martin*, *Gourde II*, *Froman* and *Wagers* and related decisions reveals that reliance on those cases as precedent for universal application of that inference is wrong. Subjecting all who visit a site that contains some legal pornography to a search of their homes solely because some who visit the site may be committing crimes violates the Fourth Amendment. *Ybarra v. Illinois*, 444 U.S. at 91.

The bottom line is Mr. Park's residence was searched solely due to his unspecified and vague association with an Internet site that contained some illegal child pornography. The search warrant was upheld because the *Martin* line of federal precedents gave the court the authority to find probable cause without individualized suspicion that the petitioner had downloaded illegal images or had any interest in child pornography. Application of the inference at issue here vitiates the Fourth Amendment's requirement of establishing probable cause in warrant applications with particularized evidence.

The court's decision in *Park II*, to the extent it deals with crimes which are becoming more and more the focus of law enforcement, poses a threat to the sanctity of the home for any individual who may be so unfortunate to have unwittingly happened upon a targeted Internet site with the purpose of viewing legal content in the privacy of their home. This court needs to intervene so that Mr. Park and countless other citizens in the future do not suffer the consequences of unreasonable searches based on the misdeeds of others.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Appeal No. **2008AP002403-CR**

Cir. Ct. No. **2005CF3970**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALEX B. PARK,

DEFENDANT-APPELLANT.

(Filed Aug. 4, 2009)

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Alex B. Park appeals from an order entered following a ***Franks v. Delaware***, 438 U.S. 154 (1978) hearing, where the trial court found that Special Agent Eric J. Szatkowski did not make false statements in his affidavit for the application of the search warrant used to search Park's home and computer and that there was probable cause to issue the search warrant. Park argues in this appeal that paragraphs 15, 19, 20, 26, and 30 in the affidavit contain false statements, which Szatkowski made

intentionally or with reckless disregard for the truth.[1] Park contends that the affidavit was insufficient to establish probable cause to search his computer, both with and without the challenged statements, and asserts that the good faith exception does not apply. Because the challenged statements in the affidavit were not false or made with reckless disregard for the truth, and the affidavit states sufficient facts to support probable cause to conduct the search, we affirm.[2]

BACKGROUND

¶2 In February 2003, the Bureau of Immigration and Customs Enforcement (ICE) began a federal investigation of Internet child pornography called "Operation Falcon." During the ICE investigation, they discovered a member-only website "www.darkfeeling.com" operated by Regpay, a company located in Minsk, Belarus. ICE obtained the records of customers who had purchased membership access

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[1] In his first appeal, Park raised concerns about paragraph 19, but he did not challenge paragraphs 15, 20, 26 or 30. The State, however, did not object to Park challenging the additional paragraphs during the ***Franks v. Delaware***, 438 U.S. 154 (1978) hearing on remand. Thus, we will address the additional paragraphs in this appeal.

[2] Based on this disposition, we need not address whether the good faith exception to the exclusionary rule, *see* ***United States v. Leon***, 468 U.S. 897, 918-20 (1984), applies. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need to be addressed).

to various Regpay websites, and over the next several years investigated those customers.

¶3 Szatkowski, a senior special agent for the Wisconsin Department of Justice (DOJ), was assigned to assist ICE with the investigations conducted in southeastern Wisconsin. Szatkowski applied for a search warrant of Park's home and office based on Szatkowski's June 17, 2005 affidavit. The search warrant was issued on June 22, 2005. The warrant was executed the same day and Park's home computer was seized. Forensic analysis of the computer revealed approximately forty images of child pornography. In July 2005, Park was charged with six counts of possessing child pornography, contrary to WIS. STAT. § 948.12 (2005-06).[3] Park pled not guilty and on October 11, 2005 filed a motion seeking suppression of the evidence seized from his home. The trial court summarily denied the motion. On November 15, 2005, Park filed a "**MOTION TO SUPPRESS EVIDENCE DUE TO *FRANKS* VIOLATION**" alleging that Szatkowski, in paragraph 19 of the affidavit for the search warrant, made statements that were false or made with intent to mislead.

¶4 On April 4, 2006, Park entered into a plea bargain with the State and pled guilty to three counts of possession of child pornography. The other three counts were dismissed. Park was sentenced to fifteen

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[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

months' probation on each count, to be served concurrently. The sentence, however, was stayed pending appeal on the suppression motion.

¶5 Park appealed to this court, arguing that paragraph 19 of Szatkowski's affidavit in support of the search warrant "contained knowingly false or misleading statements without which no probable cause existed for the issuance of the search warrant; therefore, Park is entitled to a ***Franks*** hearing." We agreed that Park should be granted a ***Franks*** hearing "for a determination of whether the statements by Szatkowski in his affidavit regarding Richard Nelson (the Waukesha case arising out of a similar investigation) were made knowingly false, with reckless disregard for their accuracy, or for the purpose of misleading the court in order to obtain the search warrant." ***State v. Parks***, No.2006AP1139-CR, unpublished slip op. ¶28 (WI App Aug. 7, 2007).

¶6 The case was remanded to the trial court for a ***Franks*** hearing, which was conducted on November 9 and 29, 2007. At the hearing, Park challenged paragraph 19 of Szatkowski's affidavit and, for the first time, paragraphs 15, 20, 26, and 30.

¶7 On June 18, 2008, the trial court issued an order finding that: (1) Szatkowski did not intentionally or with reckless disregard of the truth make a false statement in his affidavit; (2) the affidavit did not contain false information; and (3) there was probable cause to support the issuance of the search warrant. Park now appeals.

DISCUSSION

I. *Franks* Challenge

¶8 Park challenges certain allegations in the affidavit for the search warrant on the grounds that the affiant intentionally lied or recklessly disregarded the truth under ***Franks***, 438 U.S. at 156. He contends that without those allegations, the application for the search warrant lacks probable cause.

¶9 It is the defendant's burden at a ***Franks*** hearing to "prove, by a preponderance of the evidence, that the challenged statement is false, that it was made intentionally or with reckless disregard for the truth, and that absent the challenged statement the affidavit does not provide probable cause." ***State v. Anderson***, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987) (citing ***Franks***, 438 U.S. at 156).

¶10 The challenged statement must be either intentionally false, amounting to perjury, *see* ***State v. Mitchell***, 144 Wis. 2d 596, 605, 424 N.W.2d 698 (1988) (citing ***Franks***, 438 U.S. at 155-56), or it must be made with reckless disregard for the truth. "Proof that the challenged statements were made innocently or negligently is insufficient to have the challenged statement removed from the affidavit." ***Anderson***, 138 Wis. 2d at 463. Reckless disregard for the truth requires the defendant to prove that the affiant "in fact entertained serious doubts as to the truth of the allegations or had obvious reasons to doubt the veracity of the allegations." ***Id.*** (citing, among other

authorities, ***United States v. Williams***, 737 F.2d 594, 602 (7th Cir. 1984)). Because the defendant must show intent or reckless disregard, the ***Franks*** test necessarily focuses on the state of mind of the affiant. ***Anderson***, 138 Wis. 2d at 464.

¶11 At the conclusion of the ***Franks*** hearing, the trial court found that "Agent Eric Szatkowski did not intentionally, purposely, deliberately, or with reckless disregard of the truth, make a false statement in his affidavit for application of the search warrant in this case." This court will not reverse a trial court's findings of fact unless they are "clearly erroneous." *See* WIS. STAT. § 805.17(2). On review, "this court will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence." ***State v. King***, 175 Wis. 2d 146, 150, 499 N.W.2d 190 (Ct. App. 1993). From our review of the record we conclude that Park has not met his burden of showing that the trial court's findings of fact were clearly erroneous.

A. Paragraph 19

¶12 Park claims that Szatkowski was intentionally untruthful or recklessly disregarding the truth when he stated in paragraph 19 of his June 17, 2005 affidavit for a search warrant for Park's computer, that Richard Nelson "*did nothing in response to get rid of the images of child pornography he possessed.*" (Emphasis added). Park bases his challenge on Nelson's statement to Szatkowski, before Szatkowski's

affidavit, in which Nelson said that he *had deleted* the images that he thought were illegal. Therefore, Park argues Szatkowski's statement that Nelson "did nothing" was false.

¶13 Park's argument fails because the entirety of Nelson's statement demonstrates that while Nelson stated he deleted some illegal images, he admitted he did not delete all of the images of child pornography, namely, the ones that depicted lewd displays of children's genitals. Therefore, Szatkowski's paragraph 19 statement is not false.

Paragraph 19 states in full:

> Additionally, in the Operation Falcon investigations already worked by your affiant (as described in Paragraph 7 of this affidavit), the last known access of child pornography websites in those cases took place between one to two years prior to the execution of the search warrants. Your affiant has found that the time lapse between the obtaining of child pornography by the suspect and execution of warrants did not result in a lack of evidence, or destruction of all evidence due to the passage of time. Conversely, the passage of time allowed many suspects the opportunity to obtain, view, and possesses [sic] additional images of child pornography. For example, in a Falcon search warrant executed in Waukesha in February of 2005, the suspect, Richard Nelson, admitted to your affiant that about two years ago, he used his credit card to pay a company to access child pornography

> websites. Nelson essentially stated that he also read various news accounts afterwards about that same company getting busted.
>
> *Despite that knowledge, Nelson did nothing in response to get rid of the images of child pornography he possessed, and continued to obtain more images.* Nelson also commented to your affiant that he was surprised that it took so long for law enforcement to contact him, and that the investigation was still even going on.

(Emphasis added.)

¶14 Nelson's statement to Agents Szatkowski and Michael Hoell's states:

> NELSON then stated that he knew that the company who collected payment for these sites was involved in the illegal hosting of child pornography and that he had heard this approximately two years ago. NELSON stated he knew specifically that the websites he purchased into under REG PAY were illegal and that he was surprised it took so long for law enforcement to make contact with him.
>
> NELSON was asked if he accessed and downloaded images from the above sites and he stated he did and that he would have "some stuff" on his computer, but was not really sure if all his downloaded images were illegal. NELSON then asked S/A Szatkowski what the definition of "kiddie porn" was, stating further he thought that in order for

> the images to be illegal they had to show kids involved in sex acts with another person. S/A Szatkowski stated that even images of children with lewd displays of genitals are child pornography.
>
> *NELSON then said he had accessed images of children both displaying genitalia as well as sex acts involving children but that he had deleted the images he thought were illegal right after opening them. NELSON states that if images of children displaying genitalia were illegal then agents should just "slap the cuffs on me now."*

(Emphasis added.)

¶15 Nelson admitted having the illegal images of children lewdly displaying their genitalia on his computer by saying that the agent "should slap the cuffs on him right now." He did nothing to remove them and they were child pornography. Nelson admitted he had downloaded material from the websites that had been shut down for illegal child pornography. He volunteered that he would have "some stuff" on his computer that he was not sure was legal or illegal. In context, it is clear, when Nelson said that he had deleted some images that he thought were illegal, he also conceded that he "did nothing" to delete the ones that he *mistakenly* thought were legal, or was unsure about. Therefore, Szatkowski was correct when he said Nelson did not delete illegal images of child pornography. Basically, Park is arguing that an omitted fact (he deleted *some* images)

makes the statement in paragraph 19 false. Omissions can be the basis of a ***Franks*** challenge, but the omission must be of a material fact without which the affidavit would lack probable cause. "[T]he omitted fact must be material – that is, if the fact were included, the affidavit would not support a finding of probable cause." ***Williams***, 737 F.2d at 604. Here, applying the ***Williams*** test and adding back in the arguably omitted part (Nelson did delete *some* images), the affidavit still states probable cause that the illegal images will be found on Park's computer because the rest of the statement is that Park did not delete other illegal images.[4]

¶16 The Wisconsin Supreme Court addressed and rejected an omitted fact argument in ***Anderson***. The court concluded that the omission did not constitute reckless disregard for the truth because the challenged statement "did not affirmatively state one way or the other," a contrary fact. ***Id.*** (challenged statement that informant twice "return[ed] to" the premises was found not to be untrue or recklessly imply an untruth because it did not expressly state that the affiant saw the informant *enter* the house). Similarly, Szatkowski's statement that Nelson did

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[4] We similarly reject Park's argument that Szatkowski was obligated under ***Franks*** to include in the affidavit the fact that Park bought a new computer in 2004. Assuming, without deciding, that Park presented that evidence at the hearing, that omitted fact also fails the ***Williams/Franks*** tests. Inclusions of that fact (new computer) would not defeat probable cause – as we note in the next section.

nothing to delete images of child pornography is true. Precisely parsing Szatkowski's statement, as the court did in ***Anderson***, demonstrates that the statement is not false.

¶17 It is Park's burden to establish that Szatkowski intended to make a false statement or recklessly disregarded the truth. Szatkowski directly testified that he did not. At the ***Franks*** hearing, Szatkowski stated that he did not intend to lie and believed he was testifying truthfully. He testified that when he made the statement in paragraph 19, he was writing from memory of what Nelson had told him. He testified that when he stated that Nelson did nothing to get rid of child pornography he possessed, Szatkowski believed it to be an accurate summary of what Nelson had told him. Reckless disregard for the truth requires proof from the defendant "that the affiant in fact entertained serious doubts as to the truth of the allegations or had obvious reasons to doubt the veracity of the allegations." ***Anderson***, 138 Wis. 2d at 463-64 (citing, among other authorities, ***Williams***, 737 F.2d at 602). Park offered no evidence that Szatkowski had serious doubts about the truth of his statement. In Szatkowski's mind, Nelson had done nothing to get rid of what Szatkowski knew to be illegal, the images of children lewdly displaying genitalia.

¶18 In additional support that his state of mind was not seeking to lie or mislead, Szatkowski testified at the ***Franks*** hearing that he felt he would have gained nothing by including the "*deleted some images*"

fact in his affidavit. Szatkowski testified that the reason he included the Nelson incident in the affidavit was to provide an example that rebutted any claim of staleness in a two-year time frame. He already had included in the affidavit the statement of the proclivity of Internet child pornography subscribers to download and retain their images, which we more fully discuss in the next section. Adding the omitted part, "*he did delete some images*," would not have defeated probable cause.

B. Paragraph 15

¶19 Park challenges the truthfulness of Szatkowski's statement in paragraph 15 of his affidavit that: "Your affiant knows that a forensic examination of such a hard-drive can identify and retrieve such images, including those of child pornography, even if those images have been deleted by the computer operator."

¶20 In his brief on appeal, Park argues that this statement is "significantly misleading and untruthful" because, Szatkowski admitted in his testimony that deleted images *would not necessarily* be found on a hard drive. He testified that it was possible, at some point, over time, that deleted images will be overwritten. Once again, as in the case of Park's paragraph 19 argument, his argument is based on a claimed omission. The claimed omitted fact is that sometimes a forensic exam will not find deleted images.

¶21 Park's argument fails because, first of all, Szatkowski's statement on its face, is clearly consistent with Park's position that retrieval will not always be possible. Szatkowski said forensic examination *can* reveal deleted images, which is a true statement and his admission that sometimes the forensic exam will not reveal deleted images does not contradict that. The actual exchange between the questioner, Park's counsel, and Szatkowski follows:

> Q: All right. And people who delete images that they view on their computer don't remove the images from their hard drive; correct?
>
> A: At some point those images, if the computer is used, those images will become overwritten; and they won't be able to be found at some point."
>
> Q: All right. Well, there is a paragraph in you application that deals specifically with that; right? (Counsel here reads paragraph 15) Correct?
>
> A: You're not emphasizing a certain word in that sentence. A forensic examination of such a hard drive "can" identify. It doesn't say "will".

¶22 As with Park's "omitted fact" challenge to paragraph 19, his challenge to paragraph 15 also fails the ***Williams*** test. The omission is not material to probable cause. The fact that sometimes images cannot be retrieved, would not defeat probable cause here because the balance of the statement is that

sometimes images *can* be retrieved. The statement, even if worded as Park argues it should be, would still express the fact that some images of child pornography are able to be retrieved even after a long period of time.

C. Paragraphs 20 and 26

¶23 Park argues that Szatkowski's statements in paragraphs 20 and 26 are intentionally false or recklessly misleading because they contain mischaracterizations of the content at "darkfeeling.com." Park argues that Szatkowski knew and admitted at the hearing that he doubted any of the images on "darkfeeling.com" were of children engaged in sex acts with other children.

¶24 The flaw in Park's argument is that both of these alleged mischaracterizations repeat what the federal agents said they saw. Paragraph 20 is Szatkowski's statement of what he read in the federal agents' reports of what they saw on the various websites of a company called Regpay. Paragraph 26 is Szatkowski's statement of what he read in the federal agents' reports of what they observed on the "darkfeeling.com" website (one of the Regpay sites).

¶25 Paragraph 20 provides:

> In or about February 2003, a federal undercover operation coordinated out of the District of New Jersey revealed that a company called "Regpay," located in Minsk, Belarus, owned and operated various members-only

> Internet websites containing images of what appeared to the federal agents in New Jersey to be real children engaging in pornographic and sexually explicit conduct with other children and with adults.

¶26 Paragraph 26 provides:

> The ICE agents determined that the website contained extensive collections of sexually explicit photographic and video images of what appear to be real children posing and/or engaged in pornographic activities with other children. In July and August of 2003, the ICE agents also captured the contents of the website when they visited the site.

¶27 ***Franks*** explicitly acknowledges that statements in an affidavit will, at times, be based on hearsay from an informant. *See* ***id.***, 438 U.S. at 165. The ***Franks*** test, as applied to hearsay statements, is whether the affiant believed or appropriately accepted the information from the informant as true:

> This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. *But surely it is to be "truthful" in the sense that the information*

> *put forth is believed or appropriately accepted by the affiant as true.*

Id. (emphasis added).

¶28 Szatkowski believed and appropriately accepted the federal agents' reports. In paragraphs 7 and 8 of his affidavit, Szatkowski clearly described the extensive background he had with the federal agents in Operation Falcon. He had been the lead agent in approximately twenty such operations in Wisconsin, all of which had resulted in search warrants and evidence recovered. He explained that he believed the information they provided him because they did so in the course of their official duties and because the results of their investigation confirmed the reliability of their information.

¶29 Szatkowski testified at the ***Franks*** hearing that he was quoting from the federal agents' reports which he believed:

> So I'm going on the belief that all of the actionable sites are child pornography web sites because that is what ICE told me. . . . I'm looking at this as an entire operation, an entire investigation, that has been looked at by ICE, by the Department of Justice attorneys, by various judges, prosecutors in this state that agree with the contention that this [darkfeeling.com] was a child pornography web site.

¶30 Yet, Park attempts to counter Szatkowski's testimony of his belief in the federal agents' reports

by arguing that Szatkowski admitted that he knew that the Regpay sites were typically "posing" sites. Szatkowski's response was that he believed that the federal agents' description of the Regpay sites was true "in a general sense," even though he knew it did not describe *all* of the Regpay websites. "[T]hat is an accurate description when you look at the totality of actual sites," he explained at the hearing.

¶31 Szatkowski's response to Park's argument that Szatkowski knew the federal agents' description of "darkfeeling.com" was inaccurate and that he relied on the federal agents' description of the site because of their more extensive knowledge of the website. Szatkowski testified that: "From what ICE gave me. I didn't have access to the full, entire website. I'm relying on what they provided me along with the sample images that they provided me."

¶32 Given the size, length and prominence of the ICE Operation Falcon, Szatkowski's history with the federal agents and his own experience in computer child sex crimes, his reliance on their website description was not inappropriate or unreasonable. Additionally, in paragraph 30 of the affidavit, Szatkowski provided summaries of three images from the "darkfeeling.com" website, the accuracy of which is not challenged by Park.

D. Paragraph 30

¶33 Park's final ***Franks*** argument needs little attention. Park argues that Szatkowski committed a ***Franks*** violation in Paragraph 30 when he referred to "young boys" when in fact the website included only girls. Park does not point out in his brief that Szatkowski then followed the "boys" statement in paragraph 30 with three examples from the website all specifically identifying the participants as *females*. The reference to boys is clearly a typographical or editing mistake. Negligence is insufficient to cause a challenged statement to be removed from an affidavit. *See* ***Anderson***, 138 Wis. 2d at 463. A ***Franks*** violation requires an intentional lie, which this certainly was not. Alternatively, ***Franks*** requires a reckless disregard for the truth which, given the inclusion of three examples of females in the same paragraph, this could never be considered. A scrivener's error is not a ***Franks*** violation. *See* ***United States v. McClellan***, 165 F.3d 535, 545 (7th Cir. 1999).

¶34 We conclude that the challenged statements in paragraphs 15, 19, 20, 26, and 30 are not false under ***Franks***. Park failed to show that Szatkowski either intentionally, or with reckless disregard for the truth, made false statements in his affidavit for the search warrant for Park's home and office. Accordingly, we conclude none of the statements need to be excised from the affidavit and we next examine the entire affidavit to determine whether it stated probable cause.

II. Probable Cause

¶35 Park argues that the affidavit lacks probable cause even with all of the challenged paragraphs included. The State disagrees. The trial court found that the affidavit, including all of the challenged paragraphs, stated probable cause. After reviewing the entire affidavit, we agree and affirm the trial court.

¶36 A search warrant may issue if probable cause is shown. *See* WIS. STAT. § 968.12(1). The issuing court must "make a practical, common-sense decision whether," under the totality of the circumstances "there is a fair probability that . . . evidence of a crime will be found in a particular place." ***State v. Multaler***, 2002 WI 35, ¶8, 252 Wis. 2d 54, 643 N.W.2d 437; *see also* ***Illinois v. Gates***, 462 U.S. 213, 238 (1983). "In addition, the warrant judge may draw reasonable inferences from the evidence presented in the affidavit." ***Multaler***, 252 Wis. 2d 54, ¶8. The level of probable cause required is less than the level required for preliminary hearing bindover. *See* ***State v. Lindgren***, 2004 WI App 159, ¶20, 275 Wis. 2d 851, 687 N.W.2d 60.

¶37 On review, the burden of proof is upon the defendant to establish that the facts were clearly insufficient to support probable cause. *See* ***Multaler***, 252 Wis. 2d 54, ¶7 (citing ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991)). We determine whether the magistrate had a substantial basis for concluding that probable cause existed.

See ***State v. Ward***, 2000 WI 3, ¶21, 231 Wis. 2d 723, 604 N.W.2d 517. Stated another way, we determine whether the issuing magistrate had "'sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched.'" ***Id.***, ¶27 (citations omitted).

¶38 After a ***Franks*** challenge, we review questions of whether the untainted portions of an affidavit support probable cause *de novo*. *See* ***United States v. Martin***, 426 F.3d 68, 74 (2d Cir. 2005). Upon review, we give "great deference" to the issuing magistrate's probable cause determination. ***Multaler***, 252 Wis. 2d 54, ¶7. "This deferential standard of review 'further[s] the Fourth Amendment's strong preference for searches conducted pursuant to a warrant.'" ***State v. Schaefer***, 2003 WI App 164, ¶4, 266 Wis. 2d 719, 668 N.W.2d 760 (citation omitted) (brackets in ***Schaefer***).

¶39 Based on our review of Szatkowski's entire June 17, 2005 affidavit we conclude that Szatkowski presented an affidavit to the issuing magistrate that provided a substantial basis for the magistrate to conclude that there was at least a fair probability that evidence of Internet child pornography would be found on Park's computer. First, the affidavit clearly presented the extensive experience and training of Szatkowski in these types of crimes. His extensive experience established his credibility and provided a basis for some of the inferences he drew from the facts he knew and observed.

¶40 Szatkowski had been a criminal investigator for twenty-five years. He had been an expert in Internet crimes against children for twenty years. He had interviewed more than 100 suspected child predators which allowed an inference to be drawn of the authenticity of his statements about their practices and behaviors. He had assisted the federal agents of the ICE on Operation Falcon, a nationwide initiative focusing on Internet child pornography since mid-2004. He knew of their expertise. He had obtained over twenty search warrants for Operation Falcon resulting in the discovery of evidence.

¶41 He reported his own and the federal agents' observations. He reported that the federal agents seized the Regpay records in June 2003 and learned that Park had subscribed to "darkfeeling.com" in May 2003. He stated that the federal agents had viewed the "darkfeeling.com" website in July and August 2003, and based on their descriptions and the affiant's long experience with Wisconsin's criminal laws, affiant believed the images described by the federal agents on the "darkfeeling.com" website fit the Wisconsin criminal code definition of a crime. He stated that, as of the date of the application for the warrant, June 17, 2005, Park still had the same e-mail account he listed with Regpay when he purchased the "dark feeling.com" membership and that Park still lived at the address he had listed when he signed up for "darkfeeling.com." Szatkowski stated that based on his extensive experience with Internet child pornographers, he knew they saved the images of child

pornography on their computers and never voluntarily disposed of them. He thereby presented facts and inferences that Park, as a paying subscriber to a known child pornography site ("darkfeeling.com"), would have retained images of child pornography on his computer which was likely to still be at his home.

¶42 Nonetheless, Park argues on appeal that even with paragraph 19 included, the affidavit fails to provide a sufficient basis to believe that evidence of child pornography would be found on Park's computer. His first argument is based on claimed omissions from the affidavit and his second argument is based on a staleness challenge. As to the omissions, Park argues that the affidavit should have included information about Park's history and whether Park fit the profile of a child molester or collector of child pornography. He, however, failed to provide any evidence of this "omitted background" that should have been included. Additionally he claims the affidavit should have alleged that Park owned the same computer in 2005 that he owned in 2003.

¶43 As we have noted above, an affidavit for a search warrant is not measured by omissions, but by the sufficiency of its statements. An omission may be relevant to probable cause if the challenger meets his burden of producing evidence that the affiant intentionally or recklessly omitted material facts. ***Williams***, 737 F.2d at 604. Park has not presented any evidence that Szatkowski omitted something material from Park's background much less that he did so intentionally or recklessly.

¶44 As to Park's argument that Szatkowski omitted mention of Park's purchase of a new computer, that fact is not material to the probable cause analysis. The test for materiality of omitted facts set forth in ***Williams*** is whether the omitted fact, if included in the statement, "would not support a finding of probable cause." ***Id.***, 737 F.2d at 604. Inclusion of the omitted fact that Park purchased a new computer one year before the execution of the search warrant would not eliminate probable cause. The facts that Szatkowski *did* include in the affidavit – the ability of a computer to store, copy to disk, transfer to other computers and otherwise retain the images – create the required inference that child pornography images will be found on Park's computer. More is not required. "It is well established in this court that 'the probable cause requirement does not require that every contrary hypothesis be excluded.'" ***United States v. Wagers***, 452 F.3d 534, 542 (6th Cir. 2006) (citation omitted).

¶45 As to Park's staleness challenge, he contends that the lapse in time between Park's May 14, 2003 purchase of a subscription to the "darkfeeling.com" website, the federal agents' observations of child pornography on "darkfeeling.com" in July and August 2003 and the application for the search warrant on June 17, 2005 is too long to support probable cause. We disagree. The passage of time alone does not make a fact stale for probable cause purposes. "If old information in a warrant affidavit contributes to an inference that probable cause exists at the time of the

application for the warrant, the age of the information is no taint." ***Multaler***, 252 Wis. 2d 54, ¶36 (citation omitted). What matters here is whether the fact of Park's May 2003 subscription leads to a fair probability that evidence of a crime will be found on Park's computer in June 2005. That, in turn, depends in part on the nature of the crime of Internet child pornography.

¶46 In the face of a staleness challenge, we review "the nature of the underlying circumstances, whether the activity is of a protracted or continuous nature, the nature of the criminal activity under investigation, and the nature of what is being sought." ***Id.***, ¶37 (citation omitted). In ***Multaler***, a homicide investigator stated in his May 1998 affidavit that the nature of serial killers was to retain mementos of their murders for as long as twenty years. ***Id.***, ¶9. Multaler's alleged connection to the victims was circumstantial evidence that his girlfriend had seen Multaler's scrapbook in 1975 containing an article about a strangulation that Multaler may have been involved in and that Multaler had written letters to the District Attorney and media expressing interest in the murders. ***Id.***, ¶¶28-29. Multaler had argued that the affidavit failed to state probable cause due to the twenty-year lapse in time since his scrapbook had been viewed. ***Id.***, ¶39.

¶47 The Wisconsin Supreme Court rejected Multaler's staleness challenge concluding:

> The type of criminal behavior being investigated was recurring, entrenched, and continuous. The nature of the criminal activity, serial homicide, and the nature of the items sought, the sort of items likely to be retained indefinitely by the killer, both lead to the conclusion that probable cause to search Multaler's house was not stale.

Id., ¶41.

¶48 Similarly, we considered the nature of the crime in evaluating a staleness challenge in ***Schaefer***. We concluded that the habits of child pornographers of going to great lengths to protect their sexually explicit materials and rarely, if ever, disposing of them supported the inference that Schaefer would still have evidence of the crime in his possession in 1998 despite the fact that the witness last saw the evidence in 1996. ***Id.***, 266 Wis. 2d 719, ¶19.

¶49 In rejecting Multaler's other argument, that the affidavit failed for lack of citations to authorities supporting the statement about the tendency of serial killers to save mementos, our supreme court in ***Multaler*** noted that there was no requirement that the investigators provide a citation for every proposition set forth in their affidavit. ***Multaler***, 252 Wis. 2d 54, ¶48. "For purposes of warrant applications, 'the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.'" ***Id.***, ¶47 (citing ***Gates***, 462 U.S. at 232).

¶50 In ***State v. Gralinski***, 2007 WI App 233, 306 Wis. 2d 101, 743 N.W.2d 448, we again noted this unique habit of child pornographers to retain their images and in the context of an Internet child pornography subscriber, noted the unique features of computers to assist in this retention of images. ***Id.***, ¶31.

¶51 ***Gralinski***[5] was an Internet child pornography case with facts in the affidavit for the search warrant that were almost identical to those in the Park affidavit. In ***Gralinski***, another Operation Falcon case, the affiant stated that the federal agents determined that Gralinski used his credit card to purchase membership in Regpay on March 9, 2003. ***Id.***, ¶5. The agents determined that the websites Gralinski registered for were displaying child pornography. ***Id.*** Then on September 8, 2005, a Wisconsin DOJ agent applied for a search warrant stating that four days earlier, he had reviewed the federal agents' reports to verify Gralinski's address, e-mail address and phone number. ***Id.***, ¶¶6-7. He also stated, in

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[5] Park argues that ***Gralinski***'s reference in footnote 1, distinguishing itself from this case means ***Gralinski*** cannot be precedent here for a finding of probable cause. *See* ***State v. Gralinski***, 2007 WI App 233, ¶2 n.1, 306 Wis. 2d 101, 743 N.W.2d 448. Park is mistaken. In footnote 1, we clearly noted that no ***Franks*** issue was raised in ***Gralinski*** and that because one was raised in ***Park***, it was remanded for the ***Franks*** hearing. ***Id.*** That is not to say however that having now determined, as we have, that the ***Franks*** challenge to the Park affidavit was unsuccessful, ***Gralinski*** has no comparison value to ***Park*** on the issue of probable cause.

language almost identical to that in the affidavit in ***Park***, that Internet child pornography subscribers tend to store and retain the images of child pornography and, that once opened, the image is saved in the computer and can be retrieved. ***Id.***, ¶8.

¶52 We concluded that the affidavit in ***Gralinski*** stated probable cause. ***Id.***, ¶12.

> Because possession of child pornography on one's computer differs from possession of other contraband in the sense that the images remain even after they have been deleted, and, given the proclivity of pedophiles to retain this kind of information, as set forth in the affidavit supporting the request for the search warrant, there was a fair probability that Gralinski's computer had these images on it at the time the search warrant was issued and executed.

Id., ¶31.

¶53 Computer sex crimes have been recognized by many courts outside Wisconsin as crimes that permit easy storage of evidence of the crime combined with participants who have a nature of hoarding the child pornography acquired. "The Second and Fifth Circuits, for example, have noted that evidence that a person visited or subscribed to websites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material." ***Wagers***, 452 F.3d at 540 (citing ***Martin***, 426 F.3d at 77; and ***United States v. Froman***, 355 F.3d 882, 890-91 (5th Cir. 2004)).

¶54 In ***Martin***, the Second Circuit Court of Appeals found that: "It is common sense that an individual who joins such a site would more than likely download and possess such material." ***Id.***, 426 F.3d at 75. In another case, the general description of the characteristics of child pornographers as hoarders of their images was found sufficient to support probable cause for a search warrant in the fact of a staleness complaint. *See* ***United States v. Gourde***, 440 F.3d 1065, 1068 (9th Cir. 2006).

¶55 Park's staleness challenge fails because Szatkowski's affidavit states that Internet subscribers to child pornography websites view, download, transfer to disks or other computers and retain the images of child pornography they obtain from the websites to which they subscribe. The affidavit establishes that Park subscribed to a website in May 2003, and that federal agents saw that it had child pornography on it in July and August 2003. Park was still living at the same home address and still had the same e-mail address at the time of the affidavit, June 2005, as he did in May 2003 when he signed up. The inferences that Park saw, downloaded and retained the illegal images are reasonable and create a fair probability that the illegal images would still be found on his computer in 2005.

¶56 We conclude that Park did not meet his burden of showing that the facts in Szatkowski's affidavit were clearly insufficient to support probable cause. There was a substantial basis for the issuing

magistrate to conclude that probable cause existed. Accordingly we affirm the decision of the trial court.

By the Court. – Order affirmed.

Not recommended for publication in the official reports.

STATE OF WISCONSIN	CIRCUIT COURT Branch 38	MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 05CF003970

ALEX B. PARK,

Defendant.

ORDER

(Filed Jun. 18, 2008)

The defendant was convicted of three counts of possession of child pornography on April 4, 2006, at which time sentence was withheld in favor of probation. An appeal was filed from the order denying his motion to suppress on grounds that the affidavit for the search warrant may have contained false statements. On August 7, 2007, the Court of Appeals remanded the case for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978).

On November 9, 2007 and November 29, 2007, the court held a hearing, and the parties subsequently filed their arguments, along with proposed findings of fact and conclusions of law. The court finds that Agent Eric Szatkowski did not intentionally, purposely, deliberately, or with reckless disregard of the truth, make a false statement in his affidavit for application of the search warrant in this

case. The court further finds that the affidavit does not contain false information based on the testimony elicited and that there was probable cause for the issuance of the search warrant based on the affidavit submitted and based on *State v. Gralinski*, 2007 Wi App 233. The court therefore adopts the State's proposed findings of fact and conclusions of law as its own.[1]

Dated this 16th day of June, 2008, at Milwaukee, Wisconsin.

BY THE COURT:

[SEAL]

/s/ Jeffrey A. Wagner
Jeffrey A. Wagner
Circuit Court Judge

[1] Good faith is not at issue based on the court's other findings.

Appeal No. 2006AP1139-CR	Cir. Ct. No. 2005CF3970
STATE OF WISCONSIN	IN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALEX B. PARK,

DEFENDANT-APPELLANT.

(Filed Aug. 7, 2007)

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Alex B. Park appeals from an order denying his motion to suppress evidence obtained under a search warrant executed on June 22, 2005, and from his subsequent judgment of conviction. Because we determine that the affidavit supporting the application for the search warrant may contain statements that were knowingly false or made with reckless disregard for the truth, and that without such statements the remaining content of the warrant affidavit is insufficient to constitute probable

cause, we remand for a hearing pursuant to ***Franks v. Delaware***, 438 U.S. 154 (1978).

BACKGROUND

¶2 The genesis of this case lies in a federal investigation of Internet child pornography by the Bureau of Immigration and Customs Enforcement (ICE) entitled "Operation Falcon," which commenced in February 2003. During Operation Falcon, the ICE determined that a member-only website operated by Regpay, www.darkfeeling.com, contained images of what ICE agents believed were pictures of real children engaging in pornographic and sexually explicit behavior with other children and with adults. ICE agents further determined that Regpay directed payment for membership into this website to an account in Florida, and in or about June 2003, ICE agents seized the customer database from the Florida account. Upon review of the database in October 2003, ICE agents determined that Park had purchased a membership to www.darkfeeling.com and that Park's purchasing information, as listed in the database, identified Park as "Alex Park," with an e-mail address, a credit card number, and listed Park's address as [Address Omitted In Printing].

¶3 Two years later, in June 2005, Wisconsin Department of Justice Senior Special Agent Eric J. Szatkowski filed a complaint and supporting affidavit for a search warrant of Park's home and computer. No reason is given in the complaint or the supporting

affidavit for the two-year delay. The affidavit first discusses Szatkowski's qualifications and training. The affidavit next discusses the ICE Operation Falcon investigation and then contains a section entitled "Background on the Use of Computers for Child Exploitation," which discusses the traits, or profile, of a collector of child pornography. Beginning at paragraph twenty of the affidavit is a section entitled "Summary of Facts Establishing Probable Cause," which specifically discusses Operation Falcon's uncovering of the Regpay company, noting that: Regpay was discovered in February of 2003; it is located in Minsk, Belarus; its customer list was maintained in a Florida account, and the list was obtained by agents of Operation Falcon in June of 2003; that in July and August 2003, agents, acting undercover, purchased memberships to the various Regpay websites and confirmed that these fee-based websites advertised, and did contain, child pornography; and that agents first reviewed in October 2003 the customer lists they obtained in June 2003.

¶4 Park's name first appears at paragraph 24, which reads as follows:

> 24. In or about early October 2003, federal agents reviewed Regpay's customer databases, and discovered that Alex Park was one of Regpay's paying customers. The purchasing information contained on Regpay's customer database for Park includes the following:

Customer Name	Customer Address	Website	Purchase Date
Alex Park, aka [E-mail Address Omitted In Printing]	[Address Omitted In Printing]	www.dark feeling.com	May 14, 2003

¶5 In the following paragraphs of his affidavit, Szatkowski sets forth how Operation Falcon obtained Park's name;[1] his review of the materials sent to him by Operation Falcon regarding darkfeeling.com, the website to which Park purchased a membership;[2] and

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[1] 25. During July and August 2003, ICE agents from the ICE Cyber Crimes Center in Virginia, with extensive background in child pornography investigations, visited the above-listed website, to which Park had purchased memberships.

[2] 27. On June 16, 2005, [Szatkowski] reviewed ICE reports about the contents of the child pornography website that Park purchased a membership to, and confirmed that the description of images described child pornography as legally defined in the state of Wisconsin.

. . . .

Description of Website Purchased by Park

29. According to the Regpay records, Park used credit card number [] to purchase a membership to www.darkfeeling.com on or about May 14, 2003.

. . . .

(Continued on following page)

his own investigation of Park.[3]

¶6 Szatkowski also provides two examples of where a search warrant based on stale information has resulted in the discovery of pornography at the subject residences. The first example was of a search warrant based upon an informant's four-year-old information that led to discovery of child pornography

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E-Mail Address Utilized by Park Associated with Website Membership

31. On June 17, 2005, [Szatkowski] reviewed records previously obtained by ICE with a summons issued to Internet service provider (ISP) Yahoo, Inc., Sunnyvale, CA, for e-mail address [E-mail Address Omitted In Printing]. That was the same e-mail address provided by Park to Regpay when he purchased a membership into the child pornography website www.darkfeeling.com. According to Yahoo, the e-mail account is active, and was registered in 2001 by a person identifying himself as Mr. Alex B. Park, [Address Omitted In Printing].

[3] **Verification of Park's Residence**

32. On June 17, 2005[, Szatkowski] received information from Wisconsin Energies Corporation that Alex Park is an active utilities customer at [Address Omitted In Printing], and has been so since 2002.

33. On June 17, 2005, [Szatkowski] reviewed records provided by the Wisconsin Department of Transportation (DOT), which indicated that Park is Alex B. Park, DOB [Date Of Birth Omitted In Printing], of [Address Omitted In Printing].

34. On June 17, 2005, [Szatkowski] reviewed records provided by the U.S. Postal Inspector's Office, which indicated that Alex Park is currently receiving mail at [Address Omitted In Printing].

on an individual's computer and further led to charges for sexual assault of a child. Szatkowski's second example included the following representation:

> Your affiant has found that the time lapse between the obtaining of child pornography by the suspect and execution of warrants did not result in a lack of evidence, or destruction of all evidence due to the passage of time. . . . For example, in a Falcon search warrant executed in Waukesha in February of 2005, the suspect, Richard Nelson, admitted to your affiant that about two years ago, he used his credit card to pay a company to access child pornography websites. Nelson essentially stated that he also read various news accounts afterwards about that same company getting busted. Despite that knowledge, Nelson did nothing in response to get rid of the images of child pornography he possessed, and continued to obtain more images.

¶7 In the final paragraph of the affidavit, entitled "Conclusion," Szatkowski provided the following:

> 35. Based on his training and experience, and the totality of this investigation, [Szatkowski] believes that evidence of child pornography is likely to be at Park's residence, [Address Omitted In Printing]. [Szatkowski] believes Park has demonstrated an interest in those materials by meticulously providing detailed personal

> information, including his name, address, e-mail address, and credit card number to a website trafficking in child pornography. [Szatkowski], therefore, also believes that Park's interest in child pornography has not diminished since his documented online activities with Regpay in 2003, and he is likely to have obtained many additional images of child pornography since he purchased a membership into www.darkfeeling.com.

As can be seen from above, the paragraphs in the affidavit relating specifically to Park discussed Szatkowski's June 16 and 17, 2005 investigation of Park, which consisted of a review of: (1) the pictures from the darkfeeling.com website obtained in 2003, which were provided by ICE; (2) the credit card information ICE obtained from Regpay, again from 2003; (3) the e-mail address information ICE obtained from Yahoo.com in 2003; and (4) Szatkowski's 2005 requests to the Wisconsin DOT, Wisconsin Energies, and the United States Postal Inspector for verification of Park's address.

¶8 Szatkowski swore his affidavit on June 17, 2005, and the search warrant was issued and executed on June 22, 2005. Pursuant to the warrant, Park's home computer was seized and analyzed by a DOJ computer forensic analyst. Approximately forty images of "what appeared to be child pornography" were discovered on Park's computer. On July 13, 2005, Park was charged with six counts of possessing child pornography, in violation of WIS. STAT. § 948.12

(2005-06).[4] Park pled not guilty and waived a preliminary hearing.

¶9 On October 11, 2005, Park filed a motion to suppress the evidence seized from his home computer. On November 15, 2005, Park filed a second motion to suppress alleging a ***Franks*** violation. In support of his motion to suppress, Park made an offer of proof which included Szatkowski's own interview notes, which stated the following:

> NELSON then said that he had accessed images of children . . . but that he had deleted the images he thought were illegal right after opening them. . . . NELSON stated further that he even recently downloaded images he thought were illegal but then deleted them.
>
> NELSON stated he knew specifically that the websites he purchased into under REG PAY were illegal and that he was surprised it took so long for law enforcement to . . . contact . . . him.
>
> NELSON stated that the computer seized from his living room area was his personal computer and that he was the original owner and sole user as he lived alone. NELSON stated he purchased the computer new from a local Apple computer store approximately one year ago.

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[4] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

After briefing to the court, the trial court denied Park's motions without a hearing.

¶10 On April 4, 2006, pursuant to a plea negotiation, Park pled guilty to three of the original six counts of possession of child pornography and was sentenced to concurrent fifteen-month sentences of probation. Park's sentence has been stayed pending the outcome of this appeal. Park appeals the denial of his two motions to suppress.[5]

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[5] Park's brief to this court contained no references to the record in his statement of facts, although in his argument he did reference the three documents in his appendix. Counsel is directed to WIS. STAT. RULE 809.19(1)(d)-(e) and ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. RULE 809.19(1)(e) specifically requires parties' briefs contain "citations to the . . . parts of the record relied on. . . ." Further, "[w]e have held that where a party fails to comply with the rule, 'this court will refuse to consider such an argument. . . .'" ***Grothe***, 239 Wis. 2d 406, ¶6 (citation omitted). In the past, we have declined to address such unsupported arguments. ***Id.***; *see also* WIS. STAT. RULE 809.83(2) ("NON-COMPLIANCE WITH RULES. Failure of a person to comply with a . . . requirement of these rules . . . is grounds for dismissal of the appeal, summary reversal, striking of a paper, imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate."). While we have chosen to consider Park's arguments in this instance, we remind counsel that "'it is not the duty of this court to sift and glean the record in *extenso* to find facts which will support'" a party's position or argument. ***Grothe***, 239 Wis. 2d 406, ¶6 (citation omitted).

STANDARD OF REVIEW

¶11 "We give great deference to the magistrate's determination that probable cause supports issuing a search warrant." ***State v. Schaefer***, 2003 WI App 164, ¶4, 266 Wis. 2d 719, 668 N.W.2d 760. "We will uphold the determination of probable cause if there is a substantial basis for the warrant-issuing magistrate's decision." ***Id.*** "This deferential standard of review 'further[s] the Fourth Amendment's strong preference for searches conducted pursuant to a warrant.'" ***Id.*** (citation omitted; alteration in original). Our review is limited to the record that was before the warrant-issuing magistrate. ***Id.***, ¶6.

DISCUSSION

¶12 Park argues that Szatkowski's affidavit in support of issuance of the search warrant of Park's residence contained knowingly false or misleading statements without which no probable cause existed for the issuance of the search warrant; therefore, Park is entitled to a ***Franks*** hearing. The State argues first that Szatkowski's statements were accurate and not false or misleading. The State argues alternatively that even if the statements were false or misleading, the affidavit contained sufficient evidence without those statements for the court commissioner to find probable cause. Finally, the State argues that should this court determine that the statements were false and that the remaining information in the affidavit was insufficient to establish probable cause,

this court should determine that the good faith exception to the exclusionary rules applies to this warrant and, therefore, all evidence seized in the execution of the warrant remains admissible against Park.

I. ***Franks*** *hearing*

¶13 In ***Franks v. Delaware,*** the United States Supreme Court considered the issue of whether "a defendant in a criminal proceeding ever [has] the right, under the Fourth and Fourteenth Amendments, subsequent to the ex parte issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant." ***Franks,*** 438 U.S. at 155. The Court held that:

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. at 155-56; *see also* ***State v. Mitchell,*** 144 Wis. 2d 596, 604-05, 424 N.W.2d 698 (1988).

¶14 The ***Franks*** Court also "specified the requirements for a [defendant's] post-search challenge to the veracity of statements underlying a search

warrant." ***Mitchell,*** 144 Wis. 2d at 605. "First, the defendant's challenge must be 'more than conclusory and must be supported by more than a mere desire to cross-examine.'" ***Id.*** (citation omitted). Second, to make a substantial preliminary showing, "the defendant must allege deliberate falsehood or reckless disregard for the truth, and the allegations must be accompanied by an offer of proof." ***Id.***; *see also* ***State v. Anderson,*** 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987). In order to achieve a substantial preliminary showing, the defendant's allegations "must point out specifically" that part of the affidavit that he or she claims is false, ***Mitchell,*** 144 Wis. 2d at 605, "'and they should be accompanied by a statement of supporting reasons,'" ***Anderson,*** 138 Wis. 2d at 462 (citation omitted). Next, if the court concludes that the defendant has met both of these requirements, *i.e.*, has made the preliminary showing,

> then the defendant is entitled to a hearing at which the defendant must then prove, by a preponderance of the evidence, that the challenged statement is false, that it was made intentionally or with reckless disregard for the truth, and that absent the challenged statement the affidavit does not provide probable cause."

Anderson, 138 Wis. 2d at 462. However, the defendant is not automatically entitled to a ***Franks*** hearing even if he or she makes a substantial preliminary showing. ***Mitchell,*** 144 Wis. 2d at 605. Rather, once a substantial preliminary showing has

been made, "the court should excise the alleged false statements" and only if the warrant affidavit is insufficient to support probable cause without the false statements is the defendant entitled to a hearing. *See* ***id.*** (if affidavit is sufficient to support probable cause without false statements, defendant not entitled to a hearing). Finally, if all of the above requirements are met, "the [F]ourth [A]mendment requires that the search warrant be voided and the evidence discovered pursuant to the warrant be suppressed." ***Anderson,*** 138 Wis. 2d at 462-63.

¶15 Park argues that because of Szatkowski's personal involvement in the Nelson case, about which he is making the false representations in his affidavit here, his false and misleading representations must have been made knowingly or in reckless disregard for the truth. As required under ***Franks,*** Park provides an offer of proof by comparing Szatkowski's averments in his affidavit to his interview notes in the Nelson case. In his affidavit, Szatkowski first stated:

> Your affiant has found that the time lapse between the obtaining of child pornography by the suspect and execution of warrants did not result in a lack of evidence, or destruction of all evidence due to the passage of time. . . . For example, in a Falcon search warrant executed in Waukesha in February of 2005, the suspect, Richard Nelson, admitted to your affiant that about two years ago, he used his credit card to pay a company to access child pornography websites. Nelson

> essentially stated that he also read various news accounts afterwards about that same company getting busted. Despite that knowledge, Nelson did nothing in response to get rid of the images of child pornography he possessed, and continued to obtain more images.

¶16 Szatkowski's own interview notes state the following: "NELSON then said that he had accessed images of children . . . but that he had deleted the images he thought were illegal right after opening them. . . . NELSON stated further that he even recently downloaded images he thought were illegal but then deleted them." "NELSON stated he knew specifically that the websites he purchased into under REG PAY were illegal and that he was surprised it took so long for law enforcement to . . . contact . . . him." Szatkowski's notes also include the following: "NELSON stated that the computer seized from his living room area was his personal computer and that he was the original owner and sole user as he lived alone. NELSON stated he purchased the computer new from a local Apple computer store approximately one year ago."

¶17 Based on the above, Park points out that contrary to doing nothing, Szatkowski's interview notes reflect that Nelson told Szatkowski that though he had purchased access to Regpay websites and knew that these websites were being investigated as long ago as two years earlier, Nelson believed he had deleted illegal images from his computer. While

Nelson later admits that he did not realize what exactly was illegal, and while his attempts to delete the images he believed to be illegal may have been unsuccessful, the picture painted by Szatkowski in his affidavit was somewhat different, *i.e.*, that Nelson not only did not attempt to delete the illegal images that he knew were the subject of a law enforcement investigation, but rather chose to keep and view the illegal images. Based upon Park's claims of false or misleading statements by Szatkowski, and Park's offer of proof, we determine that he has met the first two requirements for obtaining a ***Franks*** hearing.

II. Probable Cause

¶18 We must next determine whether the information remaining in an affidavit, after the excising of the allegedly false or misleading statements, constitutes insufficient probable cause for the warrant's issuance such that Park is entitled to a ***Franks*** hearing. *See* ***Mitchell,*** 144 Wis. 2d at 605. The determination of probable cause for a search warrant must be made on a case-by-case basis, applying the "totality-of-the-circumstances" test adopted by the United States Supreme Court in ***Illinois v. Gates,*** 462 U.S. 213, 230-31 (1983). ***Schaefer,*** 266 Wis. 2d 719, ¶17 (citation omitted). In ***Gates,*** the Court ruled that "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . a fair probability [exists] that contraband or

evidence of a crime will be found in a particular place." ***Id.***, 462 U.S. at 238.

¶19 The Wisconsin Supreme Court has determined that "[p]robable cause exists when a magistrate is 'apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, *and that the objects sought will be found in the place to be searched.*'" ***State v. Edwards,*** 98 Wis. 2d 367, 373, 297 N.W.2d 12 (1980) (quoting ***State v. Starke,*** 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1978)) (emphasis added). Probable cause is "more than a possibility, but not a probability, that the conclusion is more likely than not." ***State v. Tompkins,*** 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988). However, "'[p]robable cause to believe that a person has committed a crime does not *automatically* give the police probable cause to search his house for evidence of that crime.'" ***State v. Higginbotham,*** 162 Wis. 2d 978, 995, 471 N.W.2d 24 (1991) (citing ***United States v. Freeman,*** 685 F.2d 942, 949 (5th Cir. 1982)) (emphasis added).

¶20 The "quantum of evidence necessary to support a determination of probable cause for a search warrant is less than that required for conviction or for bindover following a preliminary examination. . . . The affidavit is to be read in a commonsense, not a hypertechnical, fashion." ***Ritacca v. Kenosha County Court,*** 91 Wis. 2d 72, 77-78, 280 N.W.2d 751 (1979). "Elaborate specificity is not required, and the officers are entitled to the support of the usual inferences which reasonable people draw from facts."

State v. Marten, 165 Wis. 2d 70, 75, 477 N.W.2d 304 (Ct. App. 1991). Issuing courts may draw inferences from all the facts presented, including facts of innocent actions. ***Schaefer,*** 266 Wis. 2d 719, ¶17.

¶21 The issuing court, when applying the ***Gates*** totality-of-the-circumstances test, must consider "all the circumstances set forth in the affidavit before [it], including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information. . . ." ***Schaefer,*** 266 Wis. 2d 719, ¶4 (quoting ***Gates,*** 462 U.S. at 238). If a warrant affidavit contains nothing more than the legal conclusions of the affiant, it is insufficient to establish probable cause. ***Id.***, ¶5; *see also* ***State v. Kerr,*** 181 Wis. 2d 372, 378, 511 N.W.2d 586 (1994) (probable cause cannot be upheld if "affidavit provides nothing more than the legal conclusions of the affiant") (citing ***Higginbotham,*** 162 Wis. 2d at 992).

¶22 When challenging a search warrant, the burden is on the defendant to prove insufficient probable cause. ***Schaefer,*** 266 Wis. 2d 719, ¶5. Our review is limited to the record that was before the warrant-issuing court, ***id.***, ¶6, and, accordingly, we restrict our review to the affidavit and search warrant submitted by Szatkowski.

¶23 Park argues that the affidavit contains information that is both stale and which is not particularized to him, and, therefore, it cannot support a finding of probable cause. In determining whether probable cause remains in the face of old

information, a warrant-issuing court may look to several factors, including: "the nature of the underlying circumstances, whether the activity is of a protracted or continuous nature, the nature of the criminal activity under investigation, and the nature of the evidence sought." ***State v. Stank,*** 2005 WI App 236, ¶33, 288 Wis. 2d 414, 708 N.W.2d 43 (citing ***State v. Multaler,*** 2002 WI 35, ¶37, 252 Wis. 2d 54, 643 N.W.2d 437). The court may also "consider the experience and special knowledge of the police officers applying for a warrant among other relevant factors." ***Id.*** (citing ***Multaler,*** 252 Wis. 2d 54, ¶43).

¶24 In reviewing the affidavit without the allegedly false or misleading statements, an issuing court is left with the following. Operation Falcon was a federal investigation of child pornography websites and other Internet activity. In February 2003, Operation Falcon discovered Regpay websites which were owned in Minsk, Belarus, and which contained pornography depicting real children in lewd poses or performing sex acts with adults or other children. In June 2003, Operation Falcon seized the customer records of Regpay customers through its credit card account provider in Florida. In July and August 2003, undercover agents purchased memberships to Regpay websites, and using those memberships, were able to access and download images of child pornography. In October 2003, ICE agents reviewed the customer list and found that Park (with identifying name, address, credit card number and e-mail address) had purchased a membership to one of Regpay's websites in

May 2003, two to three months prior to the agents' accessing of the websites.

¶25 In addition to this Operation Falcon information, the affidavit includes Szatkowski's training and experience, Szatkowski's review of the ICE information and the e-mail, utility, DOT and postal service information which he independently gathered, a general profile of a collector of child pornography, and an example of where a search warrant based upon an informant's four-year-old information led to discovery of child pornography on an individual's computer and further led to charges for sexual assault of a child.

¶26 What is not in the affidavit, however, is more telling, especially when taken in the context of the entire federal investigation and Szatkowski's training and experience as outlined in his affidavit. In his affidavit, Szatkowski *does not* describe what investigation was conducted to determine what type of membership Park purchased in May 2003, *does not* state that Park in fact downloaded anything, legal or otherwise, from the darkfeeling.com website, *does not* state whether the advertising of the website as containing child pornography was available before purchasing a membership to the website (thereby allowing the inference that Park knew the website contained illegal content), and *does not* provide any information, other than the stricken statements regarding the Nelson case, that Park either still owned the same computer from which he could have accessed the darkfeeling.com website twenty-five

months earlier, or that regardless of the computer that he currently possessed, illegal child pornography would still be on Park's current computer. Additionally, the other example Szatkowski provided to support his statement that Park's computer would contain illegal images is a case which included an informant who personally saw the information on the alleged offender's computer approximately four years earlier, and in which the alleged offender had previously been involved in child pornography and child molestation. Szatkowski presents nothing from the ICE or his own investigation that an informant provided information that Park had illegal images on his computer at any time or that Park had ever been accused of any inappropriate sexual conduct with children. While Szatkowski details the profile of a collector of child pornography, he sets forth in his affidavit no facts as to how Park fits this profile, beyond the stricken example.

¶27 Viewing the above in light of the five ***Multaler*** factors, *see* ***Stank,*** 288 Wis. 2d 414, ¶33, the affidavit clearly sets forth "the nature of the criminal activity under investigation" (investigation of Internet websites containing child pornography and those individuals who access and download images from them) and "the nature of the evidence sought."[6] The affidavit also provides the background

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[6] The first page and a half of the affidavit details what the affiant believes will be found at Park's residence, including: computers and computer peripherals; cameras; films and

(Continued on following page)

of Operation Falcon and Szatkowski's training and experience. However, when the "stale" information is viewed in the light of the underlying circumstances, including "whether the activity is of a protracted or continuous nature," the affidavit provides little help for a warrant-issuing court to infer that the evidence sought will be present at the location specified on the warrant. Without evidence showing that Park actually accessed, downloaded, or otherwise possessed illegal images from the darkfeeling.com website, or any specific facts showing how Park matched the profile of a collector of child pornography, an issuing court may not reach the inference that twenty-five months after Park purchased a membership to the darkfeeling.com website, his current computer would contain illegal images, and therefore may not find that there is sufficient probable cause for the issuance of a warrant.

¶28 For the reasons described above, we determine that Park is entitled to a ***Franks*** hearing for a determination of whether the statements by Szatkowski in his affidavit regarding Nelson (the

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videocassettes; address books, names and lists of minors who may have been sexually assaulted; diaries, calendars, and other records showing that the individual in question had computer access on the dates and times identified in the affidavit; credit card records; and occupancy or ownership records, all of which would prove that illegal child pornography had been viewed or obtained at this address. Why Szatkowski believes Park will have any such items beyond computer-related equipment is not explained.

Waukesha case arising out of a similar investigation) were made knowingly false, with reckless disregard for their accuracy, or for the purpose of misleading the court in order to obtain the search warrant.

III. Good Faith Exception to exclusionary rule

¶29 The State finally argues that even if the court finds that no probable cause existed for the issuance of the search warrant, the good faith exception to the exclusionary rule should apply. Park argues that the State has failed to meet the two requirements for application of the good faith exception.

¶30 The good faith exception is a doctrine that applies to police officers who execute a search warrant in the mistaken belief that it is valid, *see* ***United States v. Leon,*** 468 U.S. 897, 918-20 (1984), or who take some other action based on facts the officers believe to be true, although time later proved the belief to be incorrect, *see, e.g.,* ***State v. Collins,*** 122 Wis. 2d 320, 325-27, 363 N.W.2d 229 (Ct. App. 1984). In ***State v. Eason,*** 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625, the Wisconsin Supreme Court adopted the good faith exception to the exclusionary ruling, holding that "where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate, a good faith exception to the exclusionary rule applies." ***Id.,*** ¶74. This good faith exception is narrower than the good faith exception that exists

under the Fourth Amendment, and the ***Eason*** court noted that article I, section 11 of the Wisconsin Constitution guarantees more protection than the Fourth Amendment under which the good faith exception was adopted by the United States Supreme Court in ***Leon***. ***Eason***, 245 Wis. 2d 206, ¶¶60, 63.

¶31 The ***Leon*** court identified four situations in which this good faith exception to the exclusionary rule should not be recognized:

> Suppression . . . remains an appropriate remedy [1] *if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth*[;] . . . [2] where the issuing magistrate wholly abandoned his judicial role[;] . . . [3] [where the] warrant [is] based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"[;] . . . [and] [4] depending on the circumstances of the particular case, [where] a warrant may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid.

Id., 468 U.S. at 923 (citations omitted; emphasis added). Additionally, in Wisconsin, in order for the good faith exception to apply, "the State must show that the process used attendant to obtaining the search warrant included a significant investigation

and a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." ***Eason,*** 245 Wis. 2d 206, ¶63 (footnote omitted).

¶32 The State argues that both of these requirements have been met. Taking the second requirement first, the State argues that this review was done by a highly trained and competent officer, *i.e.*, by Szatkowski. The court in ***Eason*** specifically noted in its decision that this review requirement is not met either by the official issuing the warrant, *see* ***id.,*** ¶63 n.29, nor by the affiant, *see* ***id.,*** ¶63. Rather, the court, citing a Yale Law Journal article, noted that the affidavit must be reviewed by a knowledgeable police officer or government attorney who is *not* the affiant. *See* ***id.,*** ¶63 ("'[w]ell-trained officers would not seek a warrant without . . . internal screening by a *police superior* or a government lawyer'") (quoting Donald Dripps, *Living With* Leon, 95 YALE L.J. 906, 932 (1986) (footnote omitted; emphasis added)).

¶33 In ***State v. Marquardt,*** 2005 WI 157, 286 Wis. 2d 204, 705 N.W.2d 878, the supreme court again addressed the good faith exception standards it set forth in ***Eason. Marquardt,*** 286 Wis. 2d 204, ¶26. In ***Marquardt,*** the court found that because the affidavit was prepared by "an experienced district attorney" in consultation with the police officers who were investigating the crime, there was the review required by their decision in ***Eason. Marquardt,*** 286

Wis. 2d 204, ¶46. The court concluded that this met the requirement "'review by . . . a knowledgeable government attorney.'" ***Id.*** (citation omitted). In the present case, however, there is no evidence in the record that anyone reviewed Szatkowski's affidavit prior to it being presented to the warrant-issuing court. Rather, the State argues that Szatkowski's review of Operation Falcon's investigation satisfies this ***Eason*** requirement. The record does not support the State's claim that Szatkowski reviewed a significant investigation by ICE of *Park's* activities, the individual against whom the warrant is directed. The affidavit provides no direct evidence that Operation Falcon had information that Park accessed or downloaded any images from the website, but only that Park's credit card information, home address and e-mail address were used to purchase an unspecified membership to a website that contained, and advertised that it contained, child pornography. The affidavit contains no information that Szatkowski himself either conducted a significant separate investigation or that he reviewed, with a knowledgeable and critical eye, the investigation materials that specifically related to Park's actions. Rather, Szatkowski's review appears to have been limited to determining whether the images which the ICE agents obtained from the Regpay websites constituted child pornography under Wisconsin law, and a review of the e-mail address and credit card information obtained by the ICE in 2003.

¶34 Operation Falcon has been an on-going federal investigation conducted for the purpose of locating websites that contain child pornography and prosecuting the owners and users of these sites. Szatkowski, as a senior special agent of the Wisconsin Department of Justice, as well as a member of the Wisconsin Internet Crimes Against Children Task Force, also may be knowledgeable about Internet crimes against children. However, his affidavit stated only that in 2005 he reviewed the 2003 information provided to him by the ICE relating to Operation Falcon and its specific information relating to Park. This information, as set forth in the affidavit, contained no direct evidence that Park ever accessed the darkfeeling.com website, only that he purchased an unspecified membership two to three months prior to ICE agents purchasing a membership on the website. As we explained above, that does not establish probable cause to believe that these child pornography images would still be on his computer twenty-five months later.

¶35 Accordingly, should the testimony and evidence presented at the ***Franks*** hearing result in a finding of no probable cause, the trial court's evaluation of whether the good faith exception applies should be done not with respect to Szatkowski's beliefs, but only with respect to anyone who, independent of Szatkowski, executed what they reasonably believed to be a valid warrant.

By the Court. – Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 38 MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No.: 05CF003975

ALEX B. PARK,

Defendant.

DECISION AND ORDER

(Filed Dec. 16, 2005)

BACKGROUND

In February 2003, U.S. Bureau of Immigration and Customs Enforcement (ICE), in a federal investigation of Internet crimes against children known as "Operation Falcon," uncovered various fee-based, members-only websites containing images of child pornography. These websites were owned and operated by a foreign company called "Regpay," which transferred funds from U.S.-based customers accessing Regpay's child pornography websites into an account maintained by "Connections," a Florida-based company. Operating undercover, federal agents obtained membership to and visited these members-only websites, confirming that the sites advertised and contained images of child pornography.

In June 2003, ICE agents seized Regpay's customer database, which contained records for each customer who purchased access to one of Regpay's

child pornography websites. These records included the purchaser's name, home address, email address, credit card number, names of websites purchased, and the date or dates of purchase. Agents reviewing this database learned the defendant, Alex Park, purchased a membership to one of Regpay's fee-based child pornography websites ("www.darkfeeling.com") on 5/14/2003. Regpay's database also contained the email address [E-Mail Address Omitted In Printing], mailing address [Address Omitted In Printing] and credit card number Park provided to the website in association with his membership. This information was forwarded to Wisconsin Department of Justice, Division of Criminal Investigation Agent Eric Szatkowski, one of the investigators for Operation Falcon, who verified that the address, email, and credit card information in the Regpay database were accurate and belonged to Park.

During July and August 2003, agents from ICE Cyber Crimes Center visited the Regpay website to which Park had purchased a membership. The ICE agents determined that the website contained extensive collections of sexually explicit photographic and video images of what appear to be real children posing and/or engaged in pornographic activities with other children. Agent Szatkowski reviewed ICE reports about the contents of the website to which Park had purchased a membership and determined that the images described constituted child pornography as legally defined in the state of Wisconsin.

On 6/17/2005, Agent Szatkowski filed a Complaint for a search warrant and attached his affidavit with the following information: (1) the agent's qualifications, training, and experience investigating Internet crimes against children; (2) the agent's knowledge of and experience with the Operation Falcon investigative initiative; (3) the agent's training and experience in the use of computers for child exploitation and the behaviors of individuals involved with child pornography; and (4) a summary of facts establishing probable cause. Based on the information contained in Szatkowski's affidavit, the warrant court found probable cause to believe there was child pornography or evidence of its possession at Park's residence, and issued the warrant executed at the defendant's residence on 6/22/2005.

Following the search of his home, the defendant filed his first motion to suppress evidence obtained pursuant to the warrant executed on 6/22/05 on the grounds that the warrant authorizing the search was not supported by probable cause. The defendant also asserts that the good faith exception to the requirement of probable cause does not apply. Subsequently, the defendant filed his second motion to suppress, alleging the warrant executed at his home was invalid because it was based on an affidavit, which the defendant argues contains deliberately false statements or statements made in reckless disregard of the truth, in violation of *Franks v. Delaware*, 438 U.S. 154 (1978). For the following reasons, this Court finds a substantial basis for the issuing court's probable

cause determination. Therefore, the defendant's motions to suppress are denied.

DISCUSSION

Probable cause is a not a static or bright-line standard. It is a flexible, common-sense measure of the plausibility of particular conclusions about human behavior, rather than a technical, legal concept. *State v. Higginbotham*, 162 Wis.2d 978, 989 (1991). In the context of issuing a search warrant, the quantum of evidence necessary to establish probable cause is less than that required to support a bind-over for trial at a preliminary hearing. *Id.* To obtain a warrant, however, the issuing judge must be apprised of sufficient facts to "excite an honest belief in a reasonable mind that the objects sought are liked with the commission of a crime, and that they will be found in the place to be searched." *State v. DeSmidt*, 15 Wis.2d 119, 131-132 (1990). Reviewing courts accord great deference to the warrant-issuing judge's determination of probable cause and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a probable cause determination. *Higginbotham*, *supra*, at 989.

I. THE ISSUING COURT HAD A SUBSTANTIAL BASIS FOR FINDING PROBABLE CAUSE.

The first issue this Court considers is whether there is a substantial basis for the finding of probable cause. In considering whether to issue a search

warrant, a court must examine the totality of the circumstances of the case. *Illinois v. Gates*, 462 U.S. 213, 231 (1983). From the facts asserted in the warrant affidavit, the issuing court may draw reasonable inferences to support a finding of probable cause. *State v. Benoit*, 83 Wis.3d 389, 399 (1978). The court may also consider the credentials of the affiant seeking the search in making its determination. *DeSmidt*, *supra*, at 134-35 (1990). Additionally, the court may consider the conclusions of a law enforcement agent based on his experience with investigations. *Id.* Evidence in the affidavit must be seen and weighed in terms understood by those versed in the field of law enforcement. *State v. Tompkins*, 144 Wis.2d 116, 125 (1988).

In challenging the probable cause determination, the defendant bears the burden of proving that the facts are clearly insufficient to support a finding of probable cause. *State v. Multaler*, 252 Wis.2d 54, 62 (2002). Mr. Park argues in his first motion to suppress that Agent Szatkowski's affidavit does not contain specific information about the contents of the website at issue or evidence that Mr. Park downloaded, transmitted or received images of child pornography. Second, he argues that Agent Szatkowski did not have sufficient personal knowledge and experience relative to this particular case to support a finding of probable cause based on his affidavit. Third, he contends the information contained in the warrant affidavit was so stale that it was not a proper and reliable basis for issuance of the warrant. Finally,

he asserts that the agent's affidavit was impermissibly conclusory to support a finding of probable cause. Contrary to the defendant's claims, however, this Court finds information in the affidavit provides a substantial basis to support a finding of probable cause, and upholds the validity of the accompanying search warrant.

a. Warrant affidavit contains information specific the defendant.

First, a warrant affidavit need not allege a crime is currently taking place; rather, it must articulate a fair probability that evidence linked to the commission of a crime will be found. *State v. Starke*, 81 Wis.2d 399, 408 (1978). Further, in alleging probable cause, the state is not required to allege that someone witnessed a crime occurring, or that the suspect is, at present, committing a crime. *State v. Kerr*, 181 Wis.2d 372 (1994). Agent Szatkowski's affidavit alleged that evidence of possession of child pornography would be found at the defendant's home on his computer. The affidavit provides that in May 2003, Mr. Park purchased a membership to www.darkfeeling.com. In July 2003, federal agents acting in an undercover capacity bought access to the same site, verifying the existence of child pornography on the site to which Mr. Park bought access. Agent Szatkowski also described with specificity three images from the website purchased by the defendant. These descriptions meet the definition of child pornography under Wisconsin law. Combining this information with Agent Szatkowski's

experience and expert knowledge, these facts support the reasonable inference that the defendant was like to have evidence of child pornography in his possession when the warrant was issued.

b. Agent Szatkowski had knowledge of sufficient facts to show probable cause.

Second, Agent Szatkowski was highly qualified to offer the information and opinions concerning evidence of possession of child pornography and related crimes. In the affidavit, the agent discusses his training, knowledge, and experience, including two examples of other criminal defendants caught by means of Operation Falcon. Agent Szatkowski also how he personally reviewed and verified evidence and information pertaining to Mr. Park, which was provided to him by other federal agents working on the case. Thus, Agent Szatkowski had enough personal knowledge and information about the defendant's case to set forth sufficient facts to allow the issuing court to draw the inferences necessary for finding probable cause.

c. The warrant established probable cause that was not stale.

Third, neither the facts in the affidavit, nor the finding of probable cause supporting the search warrant, were based on stale information. Notably, staleness is not a separate doctrine in probable cause to

search analysis, but merely an aspect of the Fourth Amendment inquiry. *Multaler*, *supra*, at 446. Probable cause may be based in part on old information. *State v. Moley*, 171 Wis.2d 207, 210 (Ct. App. 1992). Further, probable cause to search may be based in part on an expert's opinion that certain offenders are likely to keep evidence of their crimes. *Multaler*, *supra*, at 446-47. In the face of a staleness challenge, the probable cause determination depends upon (1) the nature of the underlying circumstances, (2) whether the activity is of a protracted or continuous nature, (3) the criminal activity under investigation, and (4) the nature of what is being sought.

In his affidavit, Agent Szatkowski's states his expert opinion that "individuals who are involved in child pornography are unlikely to ever dispose of the images they possess, as those images are viewed as prized and valuable materials." He also illustrates the protracted nature of the criminal activity of possessing child pornography by providing examples of two other defendants from Waukesha County accused, charged and convicted in an almost identical manner, who maintained possession of child pornography for several years. This information must be examined in light of the fact that federal agents verified that images of child pornography were available on the site to which Mr. Park bought access. Therefore, it was reasonable for the issuing court to conclude that the defendant would behave like other possessors of child pornography and not dispose of the evidence of these images.

d. The affidavit was not impermissibly conclusory.

Finally, the defendant argues that Agent Szatkowski's affidavit is insufficient to establish the probable cause necessary to uphold the validity of the search warrant because it contains only legal conclusions of the of affiant. While the issuing court may draw reasonable inferences from the evidence presented in the affidavit, an affidavit that contains nothing but the legal conclusions of the affiant is insufficient to establish probable cause. *Higginbotham*, *supra*, at 992. While Agent Szatkowski's affidavit does contain certain conclusions, the affidavit, in whole, is far from impermissibly conclusory. Agent Szatkowski also provides support and a reasoned basis for each of his conclusions, which are based on his experience with child pornography investigations. Therefore, this Court agrees with the findings of probable cause by the issuing court.

II. GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IS APPLICABLE.

In addition to his probable cause challenge, the defendant asserts that the good faith exception to the exclusionary rule, recognized in *United States v. Leon*, 468 U.S. 897, 922-25 (1984), does not apply in the present case. The good faith exception would come into effect if this Court were to find no substantial basis for the issuing court's finding of probable cause to issue a search warrant. For the sake of examining this issue, however, this Court

finds that even if the warrant was invalidated, evidence seized in the execution of the search of Mr. Park's home may not be suppressed because the officer's reliance on the warrant was objectively reasonable.

The burden is upon the state to show that the process used in obtaining the search warrant included a significant investigation and a "review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney." *State v. Eason*, 245 Wis.2d 206, 266 (2001). In the present case, information contained in the warrant establishes that police conducted a significant investigation before obtaining the warrant. Further, the affidavit was signed by Agent Szatkowski, who, according to the affidavit, has assisted in preparing or executing 100 search warrants and consent searches, and whose experience and training in pursuing perpetrators of child pornography and exploitation are extensive. The agent's training and knowledge in the requirements of probable cause, pursuant to the *Eason* requirements, may be inferred from this experience and are thus satisfied. Therefore, the good faith exception to the exclusionary rule applies.

III. AFFIDAVIT CONTAINS NO KNOWING OR RECKLESS MISREPRESENTATIONS OR OMISSIONS RENDERING THE WARRANT DEFICIENT UNDER *FRANKS V. DELAWARE*.

Finally, the defendant alleges that Agent Szatkowski included material false statements in his affidavit and, therefore, the warrant should be invalidated and the fruits of the 6/22/05 search suppressed. In *Franks*, *supra*, at 155-56, the United States Supreme Court held that when a defendant challenges a warrant on grounds that the supporting affidavit contains a material false allegation, the defendant must first "make a substantial preliminary showing that a false statement [made] knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." This preliminary showing allows the defendant a hearing at which the defendant must establish perjury or reckless disregard by a preponderance of the evidence. *Id.* at 156.

To prove reckless disregard for the truth, the defendant must prove that the affiant "in fact entertained serious doubts as to the truth of the allegations or had obvious reasons to doubt the veracity of the allegations." *State v. Anderson*, 138 Wis.2d 451, 463 (1987). Similarly, when a defendant claims that material facts were omitted from a warrant affidavit, the defendant "must show that the information omitted was material to the determination of probable cause and that it was omitted for the purpose of misleading

the magistrate." *State v. Mann*, 123 Wis.2d 375, 390 (1985). If the defendant establishes by a preponderance of the evidence that the affidavit contained statements that were intentionally false or made with reckless disregard of the truth, the affidavit must be considered with the false material excised. *Franks*, *supra*, at 171-72. If the claim is a deliberate omission, the court must consider whether the affidavit supports a finding of probable cause if the relevant portion of the affidavit is rewritten to include the information allegedly omitted. *State v. Bruckner*, 151 Wis.2d 833, 865-66 (Ct. App. 1989).

Upon reviewing the facts of the present case, this Court declines to grant the defendant a *Franks* hearing because the defendant has failed to show that Agent Szatkowski either made statements that were intentionally or recklessly false, or omitted critical facts for the purpose of misleading the issuing court. The defendant's primary challenge pertains to Agent Szatkowski's characterization of case with highly similar facts and circumstances to Mr. Park's case, that of Richard Nelson, which the agent uses to illustrate the likelihood that the defendant would not have disposed of child pornography images. While the defendant points to isolated statements taken out of context as proof of misleading information, this Court has examined both the warrant affidavit and the Wisconsin DOJ Division of Criminal Investigation ACISS Investigative Report on Mr. Nelson and finds that Agent Szatkowski has made no false statements in his affidavit.

Additionally, the defendant claims that Agent Szatkowski omitted information that Mr. Nelson had attempted to delete some child pornography after he downloaded it approximately two years before the search was conducted. The facts pertaining to Mr. Nelson, which appear in paragraph 19 of the warrant affidavit, are included to show that despite two years of knowing the site he had purchased a membership for was illegal, and that other individuals were being arrested for child pornography, Mr. Nelson did nothing that served to permanently delete child pornography from his computer. While Mr. Nelson may have deleted some images, these attempts were at best incomplete, as Agent Szatkowski recovered numerous images of child pornography from his computer. Moreover, the defendant has failed to prove that Agent Szatkowski omitted the information at issue with the intent to mislead the issuing court, or with reckless disregard as to whether the court would be mislead. Accordingly, the issue of whether the affidavit would still support a finding of probable cause if the affidavit were corrected does not need to be considered. This court finds the search warrant is valid and the probable cause contained therein supports the issuance of the search warrant and the validity of the search performed thereon.

CONCLUSION AND ORDER

Accordingly, based on a review of the record and consideration of the arguments of the parties, IT IS HEREBY ORDERED that the defendant's motions are DENIED.

Dated this 16th day of December, 2005, in Milwaukee, Wisconsin.

BY THE COURT:

/s/ Jeffrey Wagner
Judge Jeffrey Wagner
Milwaukee County Circuit Court,
Branch 38

[SEAL] OFFICE OF THE CLERK

Supreme Court of Wisconsin

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December 14, 2009

To:

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You are hereby notified that the Court has entered the following order:

No. 2008AP2403-CR *State v. Park* L.C.#2005CF3970

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Alex B. Park, and a petition for cross review

having been filed by plaintiff-respondent-cross-petitioner, State of Wisconsin, and both considered by this court;

IT IS ORDERED that the petition for review and the petition for cross review are both denied, without costs.

David R. Schanker
Clerk of Supreme Court

COMPLAINT FOR SEARCH WARRANT

STATE OF WISCONSIN)
) ss
COUNTY OF MILWAUKEE)

Eric Szatkowski, being first duly sworn on oath complains to the said Court of the County of Milwaukee, that on the 17th day of June, 2005, in the County of Milwaukee, in or upon certain premises in the City of West Allis, Milwaukee County, Wisconsin, more particularly described as follows:

> [Address Omitted In Printing]; a single-family condominium at Courtyard Condominiums; the residence faces west, and is a 2-story building with tan brick and tan stucco siding; the roof consists of grayish-brown shingles; the shutters are maroon in color, with a matching maroon front door; the black numbers "[Number Omitted In Printing]" appear on white tiles to the left of the front door, and are mounted on the front of a brick pillar; the residence also has an attached 2-car garage with a white parcel door;

there are now located and concealed certain things, to-wit:

> 1. Computer processing units, computer disks, disk drives, tapes, cassettes, cartridges, streaming tape, commercial software and hardware, monitors, computer printers, modems, tape drives, disk application programs, data disks, system disk operating systems, magnetic media floppy disks, hardware and software operating manuals,

tape systems and hard drive and other computer related operation equipment, digital cameras, scanners, and computer photographs which may be, or are used, to visually depict or store images of child pornography, child erotica, or any information pertaining to an interest in the sexual assault of children, sexual activity with children, child pornography, or the distribution, possession or receipt of child pornography or child erotica, and the data within the aforesaid objects relating to said materials;

2. Any and all documents and records, including credit card statements, pertaining to the possession, receipt or distribution of visual depictions of minors engaged in sexually explicit conduct;

3. Videocassettes, films, undeveloped films, magazines, and/or books containing visual depictions of minors engaged in sexually explicit conduct;

4. Address books, names, lists of names and addresses of minors who may have been victims of sexual assault, or who may have been visually depicted while engaged in sexually explicit conduct;

5. Diaries, calendars, notebooks and other records tending to establish that a particular individual may or may not have had access to the computer in question at any given date and time;

6. Records showing evidence of occupancy or ownership of the premises described above, as well as ownership or use of computer equipment found in the same residence;

possessed for the purpose of evading or violating the laws of the State of Wisconsin; which things may have been used in the commission of or may constitute evidence of a crime, to-wit: possession of child pornography, committed in violation of section 948.12 of the Wisconsin Statutes.

The facts tending to establish the grounds for issuing the search warrant are as follows:

Your affiant, ERIC J. SZATKOWSKI, being duly sworn, does hereby depose and state:

QUALIFICATIONS

1. He is a Senior Special Agent with the Wisconsin Department of Justice, Division of Criminal Investigation (DCI), and has been so employed since 1991. Your affiant has extensive experience working complex criminal investigations, including Internet crimes committed against children, death investigations, cold case homicides, murder for hire, sexual assault, fugitive apprehension, and drug trafficking. Your affiant has specialized in working in an undercover capacity in several of those areas. He has received commendations for his work from various law enforcement officials and prosecutors, as well as organizations including the National Center for Missing and Exploited Children and the Wisconsin Association of Homicide Investigators.

2. Since 1999, your affiant has also been assigned to the Wisconsin Internet Crimes Against

Children Task Force (ICAC), which was developed pursuant to a federal grant received from the Office of Juvenile Justice and Delinquency Prevention and the National Center for Missing and Exploited Children. ICAC's primary responsibility is the investigation of sexual crimes committed against children through the use of a computer and the Internet.

3. As a member of the Wisconsin ICAC Task Force, your affiant, most often posing as an underage boy or girl on the Internet, has been responsible for the arrest of approximately 100 individuals from Wisconsin and across the United States, on charges including child enticement, sexual assault and attempted sexual assault of a child, traveling interstate with intent to have sex with a minor, use of a computer to facilitate a child sex crime, possession and/or distribution of child pornography, and exposure of a child to harmful materials or narration. All of those arrests have resulted in the filing of criminal charges, with convictions in every case that has reached conclusion. Your affiant has worked jointly in the area of crimes against children with federal, state, and county prosecutors, as well as federal, state, county, and local investigators.

4. Your affiant has engaged in thousands of undercover on-line communications with suspected predators of children. Your affiant has participated in interviews and interrogations of more than 100 individuals involved in the sexual abuse and/or exploitation of children. Your affiant has also participated in the preparation and/or execution of more than 100

search warrants and consent searches involving those same offenses. He has testified in Wisconsin as an expert on the sexual exploitation of children on the Internet, and has provided advice and opinions in that area to law enforcement officers throughout Wisconsin and the U.S. His expertise has been used to assist ongoing investigations and to develop affidavits in support of search warrants and subpoenas.

5. Your affiant has instructed on the topic of sexual predators of children on the Internet to more than 26,000 people in Wisconsin and around the country, with audiences including law enforcement officers, public officials, attorneys, judges, child welfare advocates, social workers, correctional officers, teachers, education administrators, business professionals, parents, and students. His training has assisted numerous law enforcement agencies in starting and conducting Internet crimes against children investigations, which have resulted in dozens of arrests.

6. During his law enforcement career, your affiant has received more than 340 hours of training on the sexual exploitation and abuse of children from federal, state, local, and private agencies, including the Federal Bureau of Investigation, the National Center for Missing and Exploited Children, the Wisconsin Division of Criminal Investigation, Practical Homicide Investigations, Inc., the American Prosecutors Research Institute, the Milwaukee County Medical Examiner's Office, the Dallas Police Department, the Wyoming Division of Criminal Investigation, and

Fox Valley Technical College, Appleton, WI. His training has included online exploitation of children; possession, collection, distribution, and manufacturing of child pornography; forensic computer examination; e-mail and Internet protocol number tracing; sexual assault and abuse of children; family/non-family abduction, child homicide, interviewing and interrogations, child prostitution, and child sex tourism.

OPERATION FALCON

7. Your affiant is currently assisting the Bureau of Immigration and Customs Enforcement (ICE), with Operation Falcon, a nationwide ICE investigative initiative focusing on Internet child pornography crimes. Your affiant knows that this initiative has resulted in search warrants, arrests, and convictions in many areas of the United States. This affidavit and application for search warrant is part of the ICE initiative in the state of Wisconsin. Your affiant has been the lead agent on approximately 20 such investigations since mid-2004, all of which have resulted in search warrants, as well as evidence indicating possession of child pornography and/or an interest in child pornography. Evidence has included digital images of child pornography (pictures and/or movies), statements from suspects, printed-out images of child pornography, credit card statements, and the identification of children who have been victims of sexual assault. Your affiant has assisted ICE agents in Wisconsin on two additional Falcon investigations, both of which had similar results.

8. As a result of his participation in this initiative, receiving information from other law enforcement officials, Internet service providers (ISP's), government agencies, and businesses, and by analyzing documents and records, your affiant is familiar with the circumstances surrounding the facts detailed in this affidavit. Your affiant believes the information provided to him by law enforcement officers during the course of this investigation, including agents from ICE, is truthful and accurate, since it was provided in the course of their official duties. Your affiant also has worked with those officers on many other occasions, and knows their work to be reliable. Your affiant also believes information provided by non-law enforcement entities in this investigation to be truthful and accurate since it was kept in the course of regular business operations.

BACKGROUND ON THE USE OF COMPUTERS FOR CHILD EXPLOITATION

9. Based on his training and experience, the primary manner in which child pornography is produced, distributed, and possessed is through the use of computers and the Internet. Pornographers produce both still and moving images directly from common video or digital cameras attached to a computer. Producers of child pornography often use a device known as a scanner to transfer photographs into a computer readable format, and to then either send the images directly through the Internet or copy the images into a disk and send them through the U.S.

mails. Many digital cameras also can be connected directly to a computer and through the use of various software programs photographs and videos can be transferred directly to a computer, can be transferred to another computer via the Internet, and can be stored directly onto a computer.

10. Once an individual opens an image of child pornography on his computer or accesses such an image through the Internet, that image is saved in the computer's "cache." This allows investigators to review a history of the images opened/accessed by the user of the computer long after the image has been opened or accessed.

11. Individuals that possess, receive, transfer, and distribute child pornography use communication devices known as a modem or cable connections that allow any computer to connect to another computer by telephone line, cable, or wireless service. By connection to an Internet service provider, electronic contact can be made to millions of computers around the world. Internet service providers (ISP's) are sometimes commercial concerns, which allow subscribers to dial local numbers and connect to a network, which is connected to their host systems. These ISP's allow electronic mail service between subscribers, and usually between their own subscribers and those of other networks. Once one has subscribed to an Internet service provider, it costs nothing to send or receive image files.

12. Furthermore, each image is a digital duplicate of the computer original; therefore, a perpetrator's child pornography collection is not diminished if he or she distributes the pornography to others via computer. Internet access also allows the computer user to locate and communicate with others of similar inclination. Once contact is established, it is then possible to send text messages and graphic images to others. These communications can be quick, relatively secure, and as anonymous as desired.

13. The ability to store images in a digital form makes the computer an ideal repository for child pornography. The size of the electronic storage media (commonly referred to as the hard drive) used in home computers has grown exponentially within the last several years. Hard drives with a capacity of one gigabyte are not uncommon, and these drives can store thousands of images at very high resolution.

14. Images can be electronically mailed to anyone with access to a computer and modem, and can be downloaded onto computers for ease of storage, duplication, and distribution. With the proliferation of commercial enterprises providing Internet service, computer transfer and digital copying is the preferred method of distributing child pornography. The capacity of computer hard drives, the ease of access and relative anonymity afforded the computer user permits individuals with an interest in child pornography to amass large collections of such materials. Those materials can be saved indefinitely on various electronic

storage devices, as well as transferred from one storage device to another.

15. Based on his training and experience, your affiant knows that each time an individual views an online digital image, that image, or remnants of that image, are automatically stored in the hard-drive of the computer used to view the image. Your affiant knows that a forensic examination of such a hard-drive can identify and retrieve such images, including those of child pornography, even if those images have been deleted by the computer operator.

16. Based on his training and experience, your affiant knows that individuals involved in child pornography will use places that they consider private and secure to receive, download, store, and/or view pornographic images or video clips available on the Internet; most often the private and secure place is the individual's residence.

17. Based on his training and experience, your affiant knows that individuals who have a sexual appetite for children often seek out, possess and/or collect child pornography, in that those images provide them with sexual stimulation, gratification, and satisfaction. Images of child pornography allow them to fuel their fantasies and validate their behavior, which society at large finds abhorrent.

18. Based on his training and experience, your affiant knows that individuals who are involved with child pornography are unlikely to ever voluntarily dispose of the images they possess, as those images

are viewed as prized and valuable materials. Your affiant also knows that individuals who have a sexual appetite for child pornography are likely to always have that desire, and that such individuals often molest children as well. For example, in 2004, your affiant investigated a Waukesha resident, David C. Kanouse, after receiving credible information from an informant that Kanouse was once involved in child pornography and child molestation. The informant in that investigation, however, had not seen or heard from Kanouse for about three or four years. Your affiant was still able to independently verify much of what the informant said about Kanouse, and that Kanouse was still using the Internet. A search warrant was obtained, which resulted in the seizure of Kanouse's computer. An examination of that computer discovered hundreds of images of child pornography, as well as videos of the same. Kanouse was charged with possession of child pornography, and further investigation resulted in multiple charges of exposing children to child pornography, second degree sexual assault of a child, and repeated sexual assault of a child. Kanouse pled guilty and in April of 2005 was sentenced to 20 years in prison.

19. Additionally, in the Operation Falcon investigations already worked by your affiant (as described in Paragraph 7 of this affidavit), the last known access of child pornography websites in those cases took place between one to two years prior to the execution of the search warrants. Your affiant has found that the time lapse between the obtaining of child

pornography by the suspect and execution of warrants did not result in a lack of evidence, or destruction of all evidence due to the passage of time. Conversely, the passage of time allowed many suspects the opportunity to obtain, view, and possesses additional images of child pornography. For example, in a Falcon search warrant executed in Waukesha in February of 2005, the suspect, Richard Nelson, admitted to your affiant that about two years ago, he used his credit card to pay a company to access child pornography websites. Nelson essentially stated that he also read various news accounts afterwards about that same company getting busted. Despite that knowledge, Nelson did nothing in response to get rid of the images of child pornography he possessed, and continued to obtain more images. Nelson also commented to your affiant that he was surprised that it took so long for law enforcement to contact him, and that the investigation was still even going on.

SUMMARY OF FACTS ESTABLISHING PROBABLE CAUSE

Federal agents investigate "Regpay," a company operating various members-only child pornography websites

20. In or about February 2003, a federal undercover operation coordinated out of the District of New Jersey revealed that a company called "Regpay," located in Minsk, Belarus, owned and operated various members-only Internet websites containing images of what appeared to the federal agents in New

Jersey to be real children engaging in pornographic and sexually explicit conduct with other children and with adults.

21. In or about July and August 2003, federal agents operating in an undercover capacity obtained memberships to, and visited, these members-only websites. These undercover agents confirmed by viewing the images that were on display on the internet and by visiting the sites and purchasing memberships therein that these fee-based websites advertised child pornography, and that they contained child pornography.

22. Discussions with undercover sources and other investigations by ICE agents revealed that the funds from US-based customers accessing Regpay's child pornography websites were transferred into an account maintained by a company known as "Connections", located in Fort Lauderdale, Florida.

Federal Agents Seize Regpay's Customer List

23. In or about June 2003, ICE agents from Florida seized Regpay's customer database. This database was housed on a server located in Texas. The customer database contained Regpay's records for each customer who purchased access to one of Regpay's child pornography websites. This information included the purchaser's name, home address, e-mail address, credit card number, names of websites purchased, and date(s) of purchase. This information

was then forwarded to various agents in other jurisdictions including the state of Wisconsin.

Identification of a Regpay Customer in West Allis, WI

24. In or about early October 2003, federal agents reviewed Regpay's customer databases, and discovered that Alex Park was one of Regpay's paying customers. The purchasing information contained on Regpay's customer database for Park includes the following:

Customer Name	Customer Address	Website	Purchase Date
Alex Park, aka [E-Mail Address Omitted In Printing]	[Address Omitted In Printing]	www.darkfeeling.com	May 14, 2003

25. During July and August 2003, ICE agents from the ICE Cyber Crimes Center in Virginia, with extensive background in child pornography investigations, visited the above-listed website, to which Park had purchased memberships.

26. The ICE agents determined that the website contained extensive collections of sexually explicit photographic and video images of what appear to be real children posing and/or engaged in pornographic activities with other children. In July and August of

2003, the ICE agents also captured the contents of the website when they visited the site.

27. On June 16, 2005, your affiant reviewed ICE reports about the contents of the child pornography website that Park purchased a membership to, and confirmed that the description of the images described child pornography as legally defined in the state of Wisconsin.

28. Your affiant knows that Wisconsin Statute 948.12 makes it a felony to possess child pornography. Your affiant also knows that possession can include the intentional display of images obtained from the Internet, such as by clicking on thumbnail-sized images to view them in a larger format. Your affiant observed in State of Wisconsin vs. Lindgren (July 21, 2004), that the Court of Appeals, District II, affirmed this type of computer activity could be considered evidence of possession of child pornography.

Description of Website Purchased by Park

29. According to the Regpay records, Park used credit card number [Credit Card Number Omitted In Printing] to purchase a membership to www.darkfeeling.com on or about May 14, 2003.

30. On July 21, 2003, a federal agent, acting in an undercover capacity, purchased a one-month membership to that website for approximately $57.90. The undercover agent accessed the website and downloaded images of children engaged in sexually explicit

conduct. Contained within the website were numerous pictures of young boys in various poses and states of undress. Specifically, three of the images contained in this website are described as follows:

1. **DSCN8577.jpg in Set #79:** This image features a nude prepubescent female sitting in a chair. Her right leg is bent at the knee and her leg is leaning slightly outward, her left leg is bent at the knee and is lying out to the side, parallel to the floor. Her legs are parted in approximately a ninety-degree angle, her genital area is exposed as well as her undeveloped breasts. Her left hand is grasping her left shin. The photo was taken from a frontal viewpoint.

2. **P1010370 Set #67:** This image features a nude prepubescent female lying on a bed on her back with her legs spread apart, exposing her genital area. Her left leg is bent at the knee and is leaning out to the side, her right leg is outstretched, lying flat against the bed.

3. **DSCN2327.jpg Set #60:** This image features a nude prepubescent female sitting on what appears to be a shag carpet on the floor. The nude prepubescent female is leaning back against an item of furniture with her legs spread apart, exposing her genital area. Both of her legs are bent up at the knee and are parted, leaning out away from her body. Her hands are grasping her ankles.

E-Mail Address Utilized by Park Associated with Website Membership

31. On June 17, 2005, your affiant reviewed records previously obtained by ICE with a summons issued to Internet service provider (ISP) Yahoo, Inc., Sunnyvale, CA, for e-mail address [E-Mail Address Omitted In Printing]. That was the same e-mail address provided by Park to Regpay when he purchased a membership into the child pornography website www.darkfeeling.com. According to Yahoo, the e-mail account is active, and was registered in 2001 by a person identifying himself as Mr. Alex B. Park, [Address Omitted In Printing].

Verification of Park's Residence

32. On June 17, 2005 your affiant received information from Wisconsin Energies Corporation that Alex Park is an active utilities customer at [Address Omitted In Printing], and has been so since 2002.

33. On June 17, 2005, your affiant reviewed records provided by the Wisconsin Department of Transportation (DOT), which indicated that Park is Alex B. Park, DOB [Date Of Birth Omitted In Printing], of [Address Omitted In Printing].

34. On June 17, 2005, your affiant reviewed records provided by the U.S. Postal Inspector's Office, which indicated that Alex Park is currently receiving mail at [Address Omitted In Printing].

Conclusion

35. Based on his training and experience, and the totality of this investigation, your affiant believes that evidence of child pornography is likely to be at Park's residence, [Address Omitted In Printing]. Your affiant believes Park has demonstrated an interest in those materials by meticulously providing detailed personal information, including his name, address, e-mail address, and credit card number to a website trafficking in child pornography. Your affiant, therefore, also believes that Park's interest in child pornography has not diminished since his documented online activities with Regpay in 2003, and he is likely to have obtained many additional images of child pornography since he purchased a membership into www.darkfeeling.com.

39. Lastly, your affiant requests that the this search warrant be sealed and the contents of the warrant, attached affidavit, and resulting documents not be disclosed to anyone other than occupants at [Address Omitted In Printing], the Wisconsin Department of Justice/Division of Criminal Investigation, the West Allis Police Department, the Bureau of Immigration and Customs Enforcement (ICE), and the prosecutor's office assigned to this case, unless otherwise ordered by the court. Your affiant makes this request as Operation Falcon is an ongoing initiative, and public/media disclosure of the contents of this affidavit and warrant could result in the destruction of computer and other related evidence by other

suspects currently under investigation for possession of child pornography.

WHEREFORE, the said Eric Szatkowski, prays that a search warrant be issued to search the designated premises.

/s/ Eric J. Szatkowski
Eric J. Szatkowski
Petitioner

Subscribed and sworn before
me this 17 day of June ,2005

/s/ [Illegible]

Supreme Court, U.S.
FILED
MAY 18 2010
OFFICE OF THE CLERK

No. 09-1110

In The

Supreme Court of the United States

ALEX B. PARK,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent believes the questions presented by this case are more accurately stated as follows:

1. Did the affidavit in support of the search warrant provide the issuing magistrate with a substantial basis to conclude that Alex Park might have purposely viewed, and thus knowingly possessed, images of child pornography because he purchased a membership in a fee-based, members-only website the affidavit described as harboring an extensive collection of child pornography?

2. Did the passage of two years — from Park's purchase in May 2003 of a membership in a fee-based, members-only website, which contained an extensive collection of child pornography, until the application for search warrant in June 2005 — preclude the magistrate from concluding that evidence relevant to Park's knowing possession of child pornography might still be found on his computer?

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JURISDICTIONAL STATEMENT

Park seeks review by writ of certiorari of a Wisconsin Court of Appeals decision issued August 4, 2009. *State of Wisconsin v. Alex B. Park*, No. 2008AP2403-CR, (Wis. Ct. App. August 4, 2009) (Pet-Ap. 1). The Wisconsin Supreme Court denied discretionary review on December 14, 2009 (Pet-Ap. 73). The case involves application of the Fourth Amendment of the United States Constitution as applicable to the States through the Fourteenth Amendment. This Court has jurisdiction under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Respondent State of Wisconsin agrees with Park's Statement of the Case. The State also notes that it filed in the Wisconsin Supreme Court a cross-petition for review that presented this question:

> "*Franks v. Delaware*, 438 U.S. 154 (1978), requires a defendant to make a substantial showing with reliable statements of witnesses that information in an affidavit supporting a search warrant is false before that defendant is entitled to a hearing. Is a defendant who successfully makes a substantial showing limited to presenting evidence on the portion of the warrant affidavit for which the showing was made?"

The State does not advance this question in this Court.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. NEITHER THE WISCONSIN COURT OF APPEALS' DECISION IN THIS CASE NOR THE FEDERAL CASES ON WHICH THE COURT OF APPEALS RELIED MISSTATE OR MISAPPLY THIS COURT'S CASES APPLICABLE TO SEARCH WARRANTS.

A. The Principles This Court Applies To The Review Of Search Warrant Affidavits.

The task of a magistrate issuing a search warrant is "simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "[A]s the very name implies, [the magistrate] deal[s] with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). "Perhaps the central teaching of [this Court's] decisions bearing on the probable cause standard is that it is a practical, nontechnical

conception." *Gates*, 462 U.S. at 231 (citing *Brinegar*, 338 U.S. at 176). The magistrate may draw reasonable inferences from the evidence presented in the affidavit. *Id.* at 231-32. "'[P]robable cause,' according to its usual acceptation, means less than evidence which would justify condemnation. . . ." *Id.* at 235 (quoting *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813)). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision." *Id.*

"Similarly, [this Court has] repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" *Id.* at 236 (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)). "[S]o long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Id.* (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)).

B. Park's Petition Misstates Wisconsin Law When He Interprets Wis. Stat. § 948.12(1m) To Require Actively Downloading An Illegal Image.

Both of Park's appeals in the Wisconsin Court of Appeals focused primarily on his claim that the warrant affidavit in his case contained intentionally

knowing, or recklessly made, false or misleading information. *See Franks v. Delaware*, 438 U.S. 154 (1978). Both of the Wisconsin Court of Appeals opinions, therefore, predominately address Park's *Franks* claim.

Park's initial appeal resulted in a remand to the Milwaukee County Circuit Court for an evidentiary hearing. At the hearing, the trial court found that Agent Szatkowski, the agent swearing to the affidavit, "did not intentionally or with reckless disregard of the truth make a false statement in his affidavit; [and] (2) the affidavit did not contain false information . . . ." *Park*, No. 2008AP2403-CR, slip op. ¶ 7 (Wis. Ct. App. Aug. 4, 2009) (Pet-Ap. 4). In the second appeal, the Wisconsin Court of Appeals, after rejecting Park's *Franks* challenge, addressed the question of whether Agent Szatkowski's affidavit in support of his warrant application supplied the issuing magistrate a substantial basis for finding a fair probability that Park violated Wis. Stat. § 948.02(1m) and a fair probability that evidence of his violation would be found on Park's computer. After correctly identifying this Court's standards regarding review of search warrant affidavits, the Wisconsin Court of Appeals sought to apply those standards to the facts contained in the unredacted warrant affidavit at issue in Park's case. *Park*, slip op. ¶¶ 35-38 (Pet-Ap. 19-20). While Park disagrees with the Wisconsin Court of Appeals' conclusion, he cannot seriously challenge the principles it sought to apply.

A major flaw in Park's argument equates the term "download" with the process of actively saving

digital data — in this case, an image — on his computer. *See generally* GIANNINA MARIN, *Possession of Child Pornography: Should You Be Convicted When the Computer Cache Does the Saving for You?*, 60 FLA. L. REV. 1205, 1207-08 (2008). "Download" has a broader meaning, however: "In computer networks, to 'download' means to receive data to a local system from a remote system, or to initiate such a data transfer." Wikipedia, http://en.wikipedia.org/ (use "search" feature to search for "download") (last accessed on May 6, 2010). *See also* TechDictionary.com, http://www.techdictionary.com (use "search by term" feature to search for "download") (defining "download" as "[t]o transfer files or data from one computer to another. Every time you instruct your computer system to retrieve your mail, you are downloading your mail to your computer. To download means to receive; to upload means to transmit") (last visited May 6, 2010).

When surfing the web, the broader definition applies to "download" because one's personal computer (the local system) receives digital information from a remote system (the web server on which the web page one visits resides). MARIN, *supra* p. 5, at 1208. This ambiguity in the definition of "download" can lead to misunderstanding the case law interpreting statutes making possession of child pornography illegal — a problem illustrated here by Park's incorrect assumption that a Wisconsin search warrant affidavit must contain facts from which the magistrate may infer that Park *actively* downloaded illegal images.

Under Wisconsin law, a defendant "possesses" an item when "the defendant knowingly had actual physical control" of the item or the item "is under the defendant's control but not directly in his or her physical possession." *State v. Mercer*, 2010 WI App 47, ¶¶ 15-16, ___ Wis. 2d ___, ___ N.W.2d ___, *petition for review filed.*[1] *See also* WIS. JI—CRIMINAL 920 and n.2 (2000) (supplying the definition of "possession"). A person has actual physical control of an image displayed on his or her computer screen. *See* MARIN, *supra* p. 5, at 1212. For this reason, Wisconsin law recognizes that a person can violate Wis. Stat. § 948.12(1m) when a "defendant reache[s] out for [illegal] images. This fits with the definition of constructive possession: the user could save, print or take some other action to control the images, and the user affirmatively reached out for and obtained the images knowing that the images would be child pornography . . . ." *Mercer*, 2010 WI App 47, ¶ 29.

Park's premise that he must actively save an illegal image to violate Wis. Stat. § 948.12(1m) is wrong. *State v. Lindgren*, 2004 WI App 159, ¶ 27, 277 Wis. 2d 851, 687 N.W.2d 60 (holding Lindgren violated Wis. Stat. § 948.12(1m) even though the state's evidence did not show Lindgren actively saved any images; the images were in the computer "cache" described below). It is true that a

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[1] Wisconsin Court of Appeals opinion available online at http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=48502.

saved image found on a computer's hard drive may be a violation of the statute, but it is also true a saved image is evidence of a separate prior violation as described below. TY E. HOWARD, *Don't Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files,* 19 BERKELEY TECH. L.J. 1227, 1254 (2004) (describing the "Present Possession" approach and the "Evidence of" approach to analyzing saved images). This is true regardless of whether the individual consciously saves the image.

These two approaches — the "Present Possession" approach and the "Evidence of" approach — create different factual baselines for reviewing a search warrant affidavit. In Park's view, only the "Present Possession" approach suffices — that is, only the present existence of images on his hard drive constitutes possession of illegal images at the time of the search HOWARD, *supra* p. 7, at 1254. Under this approach, Park argues that the affidavit contained neither facts claiming he actively downloaded and saved illegal images nor facts from which the magistrate could infer he actively downloaded and saved illegal images.

In the State's view, by contrast, images recovered from Park's computer hard drive constitute not only "present possession" of the saved image, but "evidence of" his prior possession when he reached out for, obtained and viewed illegal images.

Thus, the facts necessary to provide a magistrate with a substantial basis for finding a fair probability that evidence of a violation of Wis. Stat. § 948.12(1m) would be on Park's computer are

different under this "Evidence of" approach. To understand why, some technical explanation is necessary.

C. Technical Aspects Of Computer Web Surfing And Downloading As Bearing On Park's Search Warrant Affidavit.

A saved image can be recovered by forensic examination of one's hard drive. HOWARD, *supra* p. 7, at 1232-36. When someone uses a web browser to access the web, the images viewed while browsing may be saved in two ways. First, a person can affirmatively save the image — that is, create on the computer a new file that is a copy of the digital image. MARIN, *supra* p. 5, at 1211. Second, when someone visits a website, the computer (or, more accurately, the web browser) saves all of the data from a visited web page as temporary internet files (TIFs) stored in a directory known as a "cache." MARIN, *supra* p. 5, at 1213; HOWARD, *supra* p. 7, at 1229-31. These "cached" saved images are saved automatically, without any affirmative act by the computer user.

If a defendant actively saved the illegal image, the evidence of such an image recovered from a hard drive proves physical possession. But under Wisconsin law, "knowing" possession is necessary to establish possession violating the statute. *Mercer*, 2010 WI App 47, ¶¶ 15-16; WIS. JI—CRIMINAL 920 and n.2. (2000). The proof issue for the State in establishing a "present possession" offense focuses

on whether the defendant had not only physical possession but knew of that physical possession. Perhaps the defendant saved the image without first viewing it on the computer screen, in which case something more than finding the image on the computer's hard disk would be necessary to convict.

But that proof issue does not matter from the standpoint of a search warrant because police need not establish a *prima facie* case. *Gates*, 462 U.S. at 235. The saved image is relevant to the investigation and prosecution of possession of child pornography. It is part of the overall proof of a violation. Park appears to recognize as much when he argues the search warrant affidavit did not provide "individualized evidence" that he saved illegal images.

By contrast, when a person actively retrieves illegal images from a website and views them on a computer screen, there is little doubt that the person not only physically possesses the image, but is (or should be) aware of the illegal nature of the image. But when the defendant shuts down the computer or goes to a different site (say, one without illegal images), his or her possession of the displayed image (as opposed to any saved image) ends. The proof issue for the State in this circumstance is establishing that the defendant did actually knowingly possess the image by displaying it on the screen at some time in the past. Again, however, police need not establish a *prima facie* case, and a saved image, whether affirmatively saved or saved by the web browser automatically, provides some evidence that implies prior possession.

This is why the temporary internet files (TIFs) and the "cache" become important to investigations of possession of child pornography. As noted above, the computer browser automatically saves all of the data from web pages visited, including copies of any illegal images contained on those web pages. MARIN, *supra* p. 5, at 1213; HOWARD, *supra* p. 7, at 1229-31. While the automatic nature of the cached image in the TIFs make the "knowing" element of possession more difficult to prove for "cached" images (the present possession analysis), the automatic creation of TIFs also provides a fact from which a magistrate can infer that evidence of past retrieval and viewing of illegal images will exist on a computer at the time of a later search where there is a fair probability a person has "merely accessed" a website containing illegal images (the "evidence of" analysis).

D. The Legal And Technological Principles Applied To The Affidavit In Park's Case.

This case presented to the Wisconsin Court of Appeals the initial question of whether a membership in a fee-based, members-only website containing an extensive collection of illegal images provides a substantial basis for a magistrate to conclude there is a fair probability that the member "'purposefully searche[d child pornography] out on the [I]nternet,' 'intentionally view[ed] it,' and could control it." *Mercer*, 2010 WI App 47, ¶ 28 (quoting *Commonwealth v. Diodoro*, 970 A.2d 1100, 1107 (Pa. 2009)).

Park claims there was no "individualized" evidence to provide a substantial basis to conclude he intentionally viewed and could control child pornography images. But Agent Szatkowski's affidavit established all of the following facts:

- "Regpay" a company in Belarus, operated a members-only internet website (Pet-Ap. 86-87, ¶ 20).
- "Regpay" sites were fee-based (Pet-Ap. 87, ¶ 21).
- "Regpay" sites advertised child pornography (Pet-Ap. 87, ¶ 21).
- Federal agents purchased memberships and confirmed that "Regpay" sites contained child pornography (Pet-Ap. 87, ¶ 21).
- "darkfeeling.com" was a "Regpay" site (Pet-Ap. 88, ¶ 24).
- Federal agents purchased a one month membership to "darkfeeling.com" for $57.90 (Pet-Ap. 89, ¶ 30).
- Federal agents confirmed that "darkfeeling.com" contained an extensive collection of child pornography (Pet-Ap. 88-89, ¶ 26).
- Park purchased a membership in "darkfeeling.com" (Pet-Ap. 88, ¶ 24).
- Park used a credit card to purchase his membership (Pet-Ap. 89, ¶ 29).

- Park supplied his e-mail address (e-mail address omitted in printing)[2] to "Regpay" (Pet-Ap. 88, ¶ 24).
- The e-mail address (address omitted in printing) was active (Pet-Ap. 91, ¶ 31).
- Park supplied his home address (address omitted in printing) to "Regpay" (Pet-Ap. 88, ¶ 24).
- The e-mail address (address omitted in printing) was associated with the home address (addresses omitted in printing) (Pet-Ap. 91, ¶ 31).
- Park received mail and utilities at his home address (address omitted in printing) and his operator's license also showed that address (Pet-Ap. 91, ¶¶ 32-34).

The facts here were individualized to Park. The affidavit established that Park paid to belong to the "darkfeeling" website, a website whose very name indicates the nature of its content. The website advertised and federal agents confirmed it contained illegal images of child pornography. Park used a credit card associated with his home address, and gave an e-mail address linked to him in purchasing a membership. One-month memberships to the "darkfeeling" website cost $57.90. It is fair to infer that Park purposefully searched for the "darkfeeling" website. There is a fair probability, given these facts,

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[2] The Respondent, like the Petitioner, omits Park's e-mail and home addresses although both the e-mail and home addresses appear in the underlying state court record.

that Park intentionally viewed and had the ability to control some of the illegal images on the site.

Park faults the Wisconsin Court of Appeals for concluding that the above facts presented the issuing magistrate with a substantial basis for determining that there was a fair probability that Park intentionally viewed and possessed illegal images. He points first to cases involving Operation Candyman, an eGroup to collect and distribute child pornography. *United States v. Froman*, 355 F.3d 882, 885 (5th Cir. 2004); *United States v. Martin*, 426 F.3d 68, 70 (2d Cir. 2005). There are some aspects of eGroups that differ from the facts in Park's case, however. The Candyman eGroup was free of charge, *Froman*, 355 F.3d at 885, while a one-month membership in "darkfeeling" cost $57.90 (Pet-Ap. 89, ¶ 30). The Candyman eGroup provided each member e-mail delivery options; members could receive all of the e-mails, a daily summary, or no e-mails. *Froman*, 355 F.3d at 885. The affidavit here does not indicate such options were available to Park, but a warrant application need only show facts establishing probable cause. *United States v. Smith*, 581 F.3d 692, 695 (8th Cir. 2009). This Court's *Franks* holding applies to omissions as well as misrepresentations, allowing a defendant to challenge an affidavit by showing that the affiant intentionally or recklessly omitted material information. *Smith*, 581 F.3d at 695; *United States v. Kapordelis*, 569 F.3d 1291, 1309 (11th Cir. 2009); *United States v. Williams*, 737 F.2d 594, 604 (7th Cir. 1984). Park presented no evidence at the *Franks* hearing to establish he had options in this case.

Rather, Park appears to make the remarkable claim that it is unreasonable to infer that having paid $57.90 for an exclusive membership, he would view the images on the site.

Park claims that *Froman*, *Martin*, and the Ninth Circuit *en banc* decision in *United States v. Goude*, 440 F.3d 1065 (9th Cir. 2006), establish principles that violate the Fourth Amendment. To the contrary, those cases apply the common sense, nontechnical approach based on the totality of the circumstances this Court has required since *Gates*. Park's contention — that establishing that he purchased a membership in a fee-based, members-only site advertising illegal images of child pornography does not provide a substantial basis to conclude that there is a fair probability that he violated Wis. Stat. § 948.12(1m) (or its Federal counterpart) — relies on a "library analysis by scholars," not an analysis "as understood by those versed in the field of law enforcement." *Gates*, 462 U.S. at 232.

II. THE AFFIDAVIT IN PARK'S CASE PROVIDED THE MAGISTRATE A SUBSTANTIAL BASIS TO CONCLUDE THAT A FAIR PROBABILITY EXISTED THAT EVIDENCE OF HIS EARLIER VIOLATION OF WIS. STAT. § 948.12(1M) WOULD BE FOUND ON HIS COMPUTER.

The remaining question Park's case presented to the Wisconsin Court of Appeals was whether the

warrant affidavit provided the issuing magistrate a substantial basis to conclude there was a fair probability that in 2005, evidence of Park's likely illegal possession of child pornography in 2003 would be found on his computer.

> "[T]he facts in an affidavit supporting a search warrant must be sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search and not simply as of some time in the past").

United States v. Grubbs, 547 U.S. 90, 95, n.2 (2006) (quoting *United States v. Wagner*, 989 F.2d 69, 75 (2d Cir. 1993)). *See also Sgro v. United States*, 287 U.S. 206, 210-11 (1932).

While the recency of the information contained in a search warrant application is one factor bearing on the question of probable cause, there is no bright line for declaring information too stale. *United States v. Prideaux-Wentz*, 543 F.3d 954, 958 (7th Cir. 2008). "[T]he lapse of time is least important when the suspected criminal activity is continuing in nature and when the property is not likely to be destroyed or dissipated." *United States v. Lemon*, 590 F.3d 612, 614 (8th Cir. 2010) (quoting *United States v. Horn*, 187 F.3d 781, 786 (8th Cir. 1999)).

Agent Szatkowski's affidavit supporting his warrant application stated the following facts directly addressing the passage of time from Park's

active membership in the "darkfeeling" website to the time of the warrant application:

- Viewing online digital images automatically downloads that image to a computer's hard drive (Pet-Ap. 84, ¶ 15);
- Forensic examination of a hard drive can identify and retrieve images even if the images have been deleted by the computer operator (Pet-Ap. 84, ¶ 15);
- Individuals who are involved with child pornography are unlikely to ever voluntarily dispose of the images (Pet-Ap. 84-85, ¶ 18).
- Prior cases involving the same Operation Falcon resulted in recovered illegal child pornography images up to two years beyond the last known access to a website containing illegal child pornography (Pet-Ap. 85-86, ¶ 19).

As noted above, "[a] magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" *Gates*, 462 U.S. at 236 (quoting *Spinelli*, 393 U.S. at 419). This deference reflects a preference for the warrant process because it encourages "recourse to the warrant procedure . . . ." *Id. at 237.*

The affidavit in this case provided the issuing magistrate a substantial basis to believe Park's computer would still contain evidence of his intentional viewing in 2003. Although the affidavit

did not refer to TIFs or the cached images as such, it did recite that the computer "automatically downloads" viewed images "to a computer's hard drive" and that forensic examination could retrieve images "even if the images [had] been deleted by the computer operator." The affidavit additionally set out the proclivity of child pornographers to hoard their images. And lastly, the affidavit recited specific instances of forensic examinations recovering images as much as two years after the last know access to a website containing child pornography.

In view of the deferential standard employed in the review of the issuance of a search warrant, the issuing magistrate had a substantial basis to believe that a forensic examination of Park's computer would produce evidence of his probable violation of Wis. Stat. § 948.12(1m) in 2003.

III. IF THIS COURT ACCEPTS REVIEW OF THE WISCONSIN COURT OF APPEALS DECISION IN THIS CASE AND DETERMINES THAT PROBABLE CAUSE EXISTED FOR PARK'S VIEWING CHILD PORNOGRAPHY BUT THE INFORMATION WAS "STALE," IT MUST ADDRESS WHETHER GOOD FAITH UNDER *UNITED STATES V. LEON* EXISTED.

The Wisconsin Court of Appeals had no occasion to address the good faith doctrine of *United States v. Leon*, 468 U.S. 897 (1984). The court determined

that Agent Szatkowski's affidavit supporting the warrant application provided the issuing magistrate with a substantial basis to believe there was a fair probability that evidence of Park's intentional viewing of child pornography would be found on his computer. This determination obviated the need to address the *Leon* good-faith exception.

If this court agrees that Agent Szatkowski's affidavit supporting his warrant application provided the issuing magistrate with a substantial basis to believe there was a fair probability that Park's intentionally viewed child pornography but that the passage of time negated a substantial basis to believe evidence of Park's violation of Wis. Stat. § 948.12(1m) would still be found in 2005, the Court must then determine whether *Leon's* good-faith doctrine applies here. Notably, *Leon* itself involved stale information. *Leon*, 468 U.S. at 904-05.

CONCLUSION

For the reasons discussed above, respondent State of Wisconsin requests that this Court deny the petition for writ of certiorari to the Wisconsin Court of Appeals.

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In The

Supreme Court of the United States

ALEX B. PARK,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent

On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THE RESPONDENT FAILS TO ADDRESS THE ISSUES PRESENTED BY PETITIONER'S WRIT OF CERTIORARI

The respondent could not be more wrong when it argues that "while Park disagrees with the Wisconsin Court of Appeals' conclusion, he cannot seriously challenge the principles it sought to apply." Mr. Park has filed this writ precisely because he takes serious issue with the primary principle employed by the Court of Appeals to uphold the warrant in this case – namely that a probable cause finding can be made based upon a search warrant affidavit that contains virtually no incriminating individualized facts by applying the inference made available by the *Martin, Gourde* and *Froman* line of cases. Those cases would appear to allow a court reviewing a search warrant application to find, based solely on the fact that an individual accessed a website that contained both legal pornography and illegal child pornography, that he viewed and hoarded illegal images for years without any individualized evidence the person viewed illegal images or had an interest in the child pornography contained in the website. The petitioner asserts that application of that inference here, where Agent Szatkowski's boilerplate affidavit fails to allege particularized evidence regarding either the website or Mr. Park and his conduct, violates the Fourth Amendment.

The respondent attempts to divert attention away from the insufficiency of Agent Szatkowski's

boilerplate affidavit in this case by spending pages of its brief discussing "TIFS" and "computer caches" and the "evidence of" and "present possession" approaches to analyzing saved images. None of this information was included in the warrant affidavit and therefore available to the magistrate reviewing the warrant application, nor was it ever part of the trial court record in this case. The fact the petitioner has to go outside the record to find some basis to find probable cause in this warrant application is a statement as to just how lacking the affidavit is as to the kind of individualized facts that are commonplace in cases dealing with search warrants for child pornography and how critical the application of the inference authorized by the *Martin, Gourde* and *Froman* line of cases is to the result in this case.

The respondent repeatedly mischaracterizes the petitioner's argument. The respondent argues that the "major flaw" in the petitioner's position is that he equates the term "download" with the process of "actively saving digital data." The respondent asserts that the "premise of Park's argument" is that he must "actively save an illegal image" to violate Wisconsin law and that the search warrant affidavit was deficient because it did not provide "individualized evidence that he saved illegal images." (Resp. Brief 4-5, 9). The petitioner has never asserted that purposefully viewing a digital image of child pornography is not a violation of Wisconsin law and cited the relevant law in his original brief. *See State v. Lindgren*, 275 Wis. 2d 851, 687 N.W.2d 60 (Ct. App. 2004). While the information regarding "TIFS" and "computer

caches" the respondent discusses at length in its brief may allow for the possibility that a computer might have without an individual's knowledge or intent automatically saved an image that one never intended to view when he innocently happened upon a website that contained some illegal images, that potential event does not establish probable cause to believe that an individual intentionally viewed illegal images, has an appetite for child pornography and amassed a collection of illegal images over the next 25 months. Again, the fact the respondent has to resort to this type of argument is another indication of just how few individualized facts are alleged in the warrant affidavit and demonstrates how critical application of the inference at issue is to a finding of probable cause.

II. THE SEARCH WARRANT AFFIDAVIT FAILED TO ALLEGE SUFFICIENT INDIVIDUALIZED FACTS TO SUPPORT THE USE OF THE INFERENCE RECOGNIZED BY THE *MARTIN, GOURDE* AND *FROMAN* CASES TO ESTABLISH PROBABLE CAUSE

Mr. Park argues that a single two-year-old purchase of an unknown type of access for an undetermined period of time to a website that contains both legal and illegal pornography, without knowing more about the website and the individual involved, does not establish the particularized suspicion required by the United States and Wisconsin Constitutions to support the issuance of a search

warrant for a person's residence. Agent Szatkowski's affidavit fails to establish with particularized evidence a fair probability that Mr. Park purposefully visited the *darkfeelings* website knowing that it contained child pornography and with the intent to view illegal images. Similarly, there are no particularized facts contained in the warrant application about Mr. Park that could lead a reviewing magistrate to reasonably conclude that illegal images would be found on his home computer or in his residence two years after his alleged purchase of a membership to the website.

The respondent argues that the petitioner's position relies on a "library analysis by scholars," not on an analysis as understood by those "versed in the field of law enforcement." This quote comes from this court's decision in *Illinois v. Gates*, 462 U.S. 213, 232 (1983), where this court stated: "Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Id.* It is, quite frankly, disingenuous for the respondent to suggest it is Mr. Park who wants to conduct a "library analysis" here. It is the petitioner who cites the court to numerous relevant cases dealing with the same kind of search warrants seeking the same kind of evidence to support his legal argument. It is the respondent who fails to cite to any relevant precedent to suggest a warrant application with as few particularized facts as are present here should be upheld. It is the respondent who engages in a "library analysis" when it argues technical matters regarding

computer operations it obtained from two law review articles, an online technical dictionary and Wikipedia. (Resp. Brief 5).

Ironically, it is the respondent's argument that rests on this Court ultimately ignoring the fact that Agent Szatkowski is an agent experienced in the investigation of child pornography cases, that he is an "expert" in the field. (Pet. App. 77-80). An expert would know how child pornography websites advertise to potential visitors, how different types of memberships afford different types of access, that some websites are dedicated solely to those with an appetite for child pornography, that website names can indicate to prospective viewers the illegal content of the website, etc. The fact that the affidavit in this case does not state with particularity this type of evidence can only mean that Agent Szatkowski either did not conduct a sufficient investigation to obtain that information in his haste to obtain the warrant, or if he did have information regarding those matters, that what he knew was not incriminating so it was omitted. It is the petitioner, not the respondent, who wants this court to analyze the affidavit as those "versed in the field of law enforcement" would.

For example, the State relies heavily on the fact that the affidavit alleges the website contained an "extensive collection" of child pornography. An experienced agent "versed in the field of law enforcement," one who was an expert in investigation of child pornography cases, would know that some websites are dedicated solely to the dissemination of images of

child pornography and have virtually no content of interest to those searching for legal pornography. Such an experienced agent would know to state that a website was dedicated to illegal content in a search warrant application. The warrant applications in cases such as *United States v. Kunen,* 323 F.Supp.2d 390 (E.D. New York 2004) and *United States v. Martin,* 426 F.3d 68 (2d Cir. 2005), as discussed in the petitioner's original brief, contained that information. Agent Szatkowski, being an expert, can be presumed to have known exactly what he was doing when he stated in the warrant application that the website contained an "extensive collection" of child pornography. To one "versed in law enforcement," that means it contained a number of illegal images in addition to legal images. As such, the respondent in its brief does not take issue with Mr. Park's assertion that only a portion of the *darkfeelings* website contained illegal images. As damning as the description "extensive collection" may seem, in the end the warrant application here fails to give the magistrate enough information to either conclude that only those interested in child pornography would go to the *darkfeelings* website or to presume anything about what one would see who happened upon the website.

Agents experienced in the investigation of these cases know that some websites are structured and set up in a way that would require that someone deciding whether to enter the website would be informed by the welcome page or advertising of the illegal content within. Experienced agents include such information regarding warnings and advertising in their search

warrant applications when it exists. The warrant applications in *United States v. Laufer*, 245 F.Supp.2d 503 (W.D. New York 2003), *United States v. Froman*, 355 F.3d 882, 890 (5th Cir. 2004), and *United States v. Gourde,* 382 F.3d 1003 (9th Cir. 2004), *rehearing en banc,* 440 F.3d 1065 (9th Cir. 2006), as discussed in petitioner's original brief, serve as examples here. As the Court of Appeals decision in *Park I* noted, Agent Szatkowski's affidavit does not state that an individual visiting the *darkfeelings* website would see advertising or otherwise be warned that it contained illegal child pornography before purchasing a membership and/or accessing any illegal images. (Pet. App. 50). There are no facts in the affidavit that establish Mr. Park would have known that the contents of the website included illegal child pornography before he purchased a membership with his credit card.

Agents experienced in the investigation of child pornography cases include in their warrant applications specific information regarding what kind of access is granted by the different types of memberships commonly available to pornography websites, the length of the target's memberships, etc. Again, as discussed in petitioner's original brief, this kind of information was included in the warrant applications at issue in *United States v. Strauser*, 247 F.Supp.2d 1135 (E.D. Missouri 2003), *United States v. Laufer*, 245 F.Supp.2d 503 (W.D. New York 2003), and *United States v. Wagers*, 452 F.3d 534 (6th Cir. 2006). While the respondent accuses Mr. Park of making the "remarkable claim that it is unreasonable to infer

that having paid $57.90 for an exclusive membership, he would view the images on the site," Agent Szatkowski's warrant application in fact does not state that Park paid $57.90, nor does it say the membership he purchased was "exclusive." The affidavit states only that federal agents paid $57.90 to obtain a membership to the website. Agent Szatkowski's affidavit had no information regarding how much Mr. Park had paid, what type of membership he purchased, nor for how long or what kind of access to the website his credit card payment allowed.

Though the respondent asserts that the website's name "*darkfeelings.com*" indicates the "nature of its content," Agent Szatkowski evidently did not agree because he did not allege in the affidavit that the name would forewarn a potential visitor that the website would contain child pornography. An agent experienced in the investigation of child pornography cases would allege in a warrant application that the website's name was suggestive of its illegal content if that were true. Again, as discussed in petitioner's original brief, this kind of information was included in the warrant applications at issue in *United States v. Martin*, *supra*, and *United States v. Gourde*, *supra*.

An agent experienced in the investigation of child pornography cases would include evidence of a criminal history or prior conduct in a warrant application to establish the target deserved the profile of a collector of child pornography. Again, as discussed in

petitioner's original brief, this kind of information was included in the warrant applications at issue in *United States v. Wagers*, *supra*, *United States v. Irving*, 452 F.3d 110, 125 (2d Cir. 2006) and *United States v. Riccardi*, 405 F.3d 852, 860-61 (10th Cir. 2005). As recognized by the Wisconsin Court of Appeals in *Park I*, Agent Szatkowski asserted no facts in the affidavit that establish how Mr. Park fit the profile of a collector of child pornography and/or someone who would have visited the *darkfeelings* website with the purpose of viewing child pornography. (Pet. App. 51). Agent Szatkowski's affidavit provides no specific evidence that Mr. Park had ever viewed, downloaded, transmitted or received any images of child pornography from the Regpay website in 2003, nor that Mr. Park ever possessed illegal child pornography at any time before or after 2003.

The failure of Agent Szatkowski's affidavit to allege any of the particularized facts normally included in applications for warrants seeking child pornography again highlights how critical the application of the *Martin, Gourde* and *Froman* inference is to a finding of probable cause here. The failure of the affidavit to allege any of these kinds of potentially incriminating facts requires the respondent to rely heavily in its argument on the fact that Park used his credit card and provided identifying information to purchase a membership to the website. However, the information provided as listed by the respondent is information that is required for any legal purchase using a credit card on the Internet. If it suggests

anything, the fact that Mr. Park provided current identifying information that would allow authorities to locate him instantly would suggest he had no intent to commit a crime by viewing illegal images when he paid to access the website.

The respondent also suggests in its argument that the fact the website was a "members only" and "fee based" website supports a finding that the petitioner would have visited the website with the intent to view illegal images. The affidavit of Agent Szatkowski does not allege that being a "members only" or "fee based" website somehow suggests someone accessing the website could assume it contained illegal images. Anyone versed in law enforcement knows that the Internet is littered with "members only" and "fee based" websites which contain nothing but legal content.

The respondent argues that the twenty-five-month delay between Park's access to the website and the application for the search warrant should not prohibit a finding of probable cause due to the information being stale. The respondent argues that the boilerplate paragraphs of the affidavit relating to the ability of a forensic evaluation to retrieve images from a computer and the proclivities of child pornography collectors establish a likelihood that child pornography would be found at the time of the search. The warrant affidavit also referenced other Operation Falcon search warrants where images were recovered "up to two years" beyond the last known access to a website containing child

pornography. (Pet. App. 85-86). Once again, this argument inappropriately presupposes without foundation that there is evidence to establish that Mr. Park accessed the *darkfeelings* website knowing it contained child pornography and that he was a child pornography collector. As recognized by the Court in *Park I*, Agent Szatkowski's affidavit alleges no facts which establish that Park accessed the *darkfeelings* website with the intent to view illegal images or that he had a history to suggest he fit the profile of a child pornography collector. (Pet. App. 50-51). Furthermore, the lapse of twenty-five months in this case between the known access and search warrant was longer than any other Operation Falcon warrant referred to by Agent Szatkowski in his affidavit.

The validity of the warrant in this case hinges entirely on the application of boilerplate assertions and inferences regarding the conduct of people with an appetite for child pornography who have been established to have accessed a website known to contain child pornography with the purpose of viewing the illegal content of the website. The warrant application here fails to allege particularized facts from which a magistrate could conclude that Mr. Park intentionally visited the website with the purpose of viewing child pornography, that he in fact ever viewed illegal images, or that he was interested in and collected child pornography.

III. THIS COURT SHOULD REMAND THE CASE BACK TO THE WISCONSIN COURT OF APPEALS FOR A DECISION ON APPLICATION OF THE GOOD FAITH EXCEPTION

The respondent argues that if this Court agrees that Agent Szatkowski's affidavit supporting his warrant application established probable cause to believe that Mr. Park viewed child pornography in 2003 but the passage of time negated probable cause to believe child pornography would be found in 2005, this court would then have to determine if the good faith doctrine applied. *See United States v. Leon*, 468 U.S. 897 (1984).

The petitioner asserts that the issue of whether the good faith exception applies to save the warrant in this case would be determined based on the application of Wisconsin law. The standards that govern the requirements for application of the good faith exception that were adopted by the Wisconsin Supreme Court after this court's decision in *Leon* are different than those applied to federal search warrants. *See State v. Eason*, 245 Wis. 2d 206, 217 (2001). The Wisconsin Court of Appeals did not decide in *Park II* whether the good faith exception applied because it had found the warrant was supported by probable cause. (Pet. App. 2). If this court were to decide the warrant here was not supported by probable cause, it should then remand the matter back to the Wisconsin Court of Appeals for a decision on the

issue of the application of the good faith exception under Wisconsin law.

CONCLUSION

The petitioner's writ of certiorari should be granted.

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